HANDBOOK OF BANKERS' LAW.

Digitized by the Internet Archive
in 2026

https://archive.org/details/handbookofbanker0000henr_f9f4

HANDBOOK

OF

BANKERS' LAW.

BY THE LATE

HENRY ROBERTSON, N.P.

SIXTH EDITION.

REVISED AND PARTLY RE-WRITTEN BY

JOHN G. JOHNSTON,

NATIONAL BANK OF SCOTLAND, LIMITED.

(Prizeman Institute of Bankers in Scotland; late Tutor University Preparatory Institute; Author of "Handbook to Examinations of Institute of Bankers in Scotland," &c.)

EDINBURGH:

BELL & BRADFUTE, 12 BANK STREET.

LONDON: SWEET & MAXWELL, LIMITED.

1901.

EDINBURGH : PRINTED BY JAMES SKINNER AND COMPANY.

PREFACE TO THE SIXTH EDITION.

In bringing this edition down to the present time every care has been taken to retain the popular form and style of former editions. Since the last revision of the work in 1891 various important enactments, bearing more or less directly on Banking, have been passed, while several debateable points in Banking practice have been settled by decisions in the Law Courts. It has been no easy task to incorporate the import of these enactments and decisions with the former text, and at the same time to present a summary at once readable and easy of reference, without increasing appreciably the size of the book.

For the new matter referred to, resort has been had to the various Acts of Parliament and Law Reports. The recognised authorities on each subject treated in the work have also been carefully consulted and compared.

To Mr. R. Galbraith Stewart, S.S.C., who has read the whole of this edition in proof, and whose experience has given special value to his suggestions, cordial acknowledgments are hereby tendered.

Some improvements have been made on the useful Appendix and the General Index of former editions.

J. G. J.

August 1901.

PREFACE TO THE FIRST EDITION.

This Handbook has been written for the more immediate use of those engaged in the business of Banking, and the object which the Writer has had in view has been to give, in language freed as far as possible from technicalities, a concise and distinct statement of the law so far as it bears on that branch of business. To enable the Banker to carry through his more important transactions with entire confidence and security, it is essential that he should possess accurate knowledge of the law which regulates them, as, from the despatch with which business is now-a-days transacted, it is impossible for him on every occasion to find time to consult his lawyer. He should therefore not only be able at once to judge of the validity of the obligations and grounds of debt on which advances are to be made, but ought also to be aware of the legal principles by which they are regulated, so as to enable him to place his transactions on the best and safest footing. Without such knowledge the Banker runs a constant risk of being involved in lawsuits, and of suffering pecuniary loss in the event of any emergency—such, for example, as the bankruptcy of his customer.

There are many difficulties in the way of a Banker, who has not had a legal education, acquiring a knowledge of

Mercantile Law. It is no easy matter, indeed, to know where to look for the necessary information. The progress of Law Reform has of late years been so rapid, that the existing Commentaries on the Law of Scotland are quite behind the time. More especially is this the case with the "Law Merchant," which, to a great extent, lies imbedded in Acts of Parliament and Decisions of the Court. Since the publication of Mr. Bell's great work, the passing of the Mercantile Amendment and other Acts, and the introduction of English law into that of Scotland, have effected almost an entire revolution in the Mercantile Law of this country. In such circumstances, it is a hopeless task for any non-professional person to acquire accurate information from the text-books; and in the hope that it may be useful to those engaged in Banking, the Writer has attempted in this Handbook to bring together the leading principles of law bearing on Banking transactions. Some of the subjects comprehended in it—such as Bills and Bankruptcy—form the text of separate works; and it is almost unnecessary to state that the observations upon these and other matters have in this manual been limited to the points and principles which have a direct and practical bearing on the subject of the book. All irrelevant matter, and details with which it is not necessary the Banker should trouble himself, have been omitted, in order that the class of persons for whose use the work is intended may the more readily acquire the legal knowledge which has special reference to their profession.

The Writer has refrained from all speculative statements

of law, and has strictly confined himself to what has been authoritatively ascertained. From the number of subjects embraced in the book, the illustrations are necessarily limited, but references to the authorities have been added in case any one may wish to pursue his inquiries further.

The Appendix, containing Forms of documents in daily use among Bankers, will, it is thought, prove an acceptable addition to the work.

October 1862.

CONTENTS.

PAGE

TABLE OF CASES CITED, ... xvii

CHAPTER I.

MERCANTILE WRITS AND THE EXECUTION OF DEEDS, AND PARTIES WHO MAY GRANT THEM.

Writings *in re mercatoria*, ... 1
Execution of Deeds in Scotch form, ... 2
English form, ... 4
Parties who may grant Deeds, ... 6
Pupils and Minors, ... 6
Married Women, ... 8

CHAPTER II.

INTESTATE SUCCESSION TO MOVEABLES, EXECUTORS, AND TRUSTEES.

Confirmation of Executor, ... 16
Dissolution of Marriage, ... 17
Rules of Succession, ... 18
Office of Executor, ... 19
Confirmation under the Small Estates Acts, . . . 21
Powers of Trustees, ... 22

CHAPTER III.

BILLS AND PROMISSORY NOTES.

Form and Requisites, ... 27
Contract and Liability of Drawer, ... 35
Acceptance of Bills, and Payment for Honour, . . . 36
Subscription of Parties, ... 42
Transmission, ... 47

PAGE

Forgery, ... 49
Maturity and Presentment for Payment, ... 51
Dishonour, ... 54
Protest, ... 57
Diligence, ... 60
Discharge, ... 61
Bill in a Set, ... 63
Prescription, ... 63
Bills in hands of Banker, ... 65

CHAPTER IV.

Document Bills and Foreign Credits.

Document Bills, ... 68
Credits, ... 70

CHAPTER V.

Banker's Draft or Cheque, Bank Notes, and I.O.U.'s.

Definition and Requisites of Cheque, ... 72
Liability of Indorser, ... 73
Presentment for Payment, ... 74
Dishonour of Cheque, ... 76
Revocation of Banker's authority to pay, ... 77
Crossed Cheques, ... 77
Letter of Credit, ... 80
Bank Drafts, ... 81
Bank Notes, ... 82
I.O.U.'s, ... 83

CHAPTER VI.

Deposit-Receipt, Mandate, and Procuration.

Deposit-Receipt, ... 84
Indorsation, Effect of, ... 85
Receipts to be drawn by either of Two Parties, . . . 85
Receipts for Judicial and other Consignments, . . . 87
Mandates, Factory and Commission, ... 88
Procuration, ... 90
Implied Mandate, ... 92

CHAPTER VII.

Cautionary Obligations.

PAGE
Constitution, ... 94
Cautioner's Rights, ... 95
Prescription, ... 100
Cautionary Obligations to or for a Firm, ... 102

CHAPTER VIII.

Guarantees.

Constitution and Construction of, ... 105
Guarantor's Rights, ... 105
Guarantees, *Del Credere*, ... 107

CHAPTER IX.

Cash-Credit Bond.

Nature and Form of, ... 108
Rights of the Sureties, ... 109
Operations on Account, ... 110
Overdrafts, ... 111
Accumulation of Interest with Principal, ... 113
Credits in name of a Company, ... 114
Termination of Bond, ... 115
Diligence on Bond, ... 116
Cash-Account on Bills, ... 117
on Minutes of Public Bodies, . . . 118
Overdrafts by School Boards, ... 119

CHAPTER X.

Heritable and other Securities.

Bond of Credit, with Security over Heritages, . . . 121
Bond and Disposition in Security, ... 122
Securities over Leasehold Subjects, ... 124
Mortgages on Ships, ... 125
Bond of Bottomry, ... 127
Bond of *Respondentia*, ... 127

CHAPTER XI.

Securities for General Advances and Contract of Pledge.

PAGE
General Security over Heritages, ... 128
Assignation of Moveable Rights, ... 132
Loans on Security of Stocks, ... 135
Transference of Corporeal Moveables, ... 136
Bills of Lading, ... 138
Delivery Order, ... 140
Warrants for Goods, ... 144
Pledge, ... 144
Deposit of Titles, &c. 146

CHAPTER XII.

Banker's Lien, Compensation, Novation, &c.

Lien, ... 148
Compensation, ... 151
Novation, ... 153
Delegation, ... 154
Confusion, ... 154

CHAPTER XIII.

Discharge and Prescription.

Discharge, ... 155
Implied Discharge, ... 156
Prescription, Triennial, &c. 157

CHAPTER XIV.

Diligence.

Arrestment, ... 160
Furthcoming, ... 161
Effect of Arrestment, ... 162
Prescription of Arrestment, ... 163
Poinding, ... 163
Inhibition, ... 166
Adjudication, ... 167
Poinding of the Ground, ... 168

CHAPTER XV.

NOTOUR BANKRUPTCY, INSOLVENCY, AND PREFERENCES TO CREDITORS.

PAGE
Notour Bankruptcy, ... 171
Alienations by Insolvent Persons, ... 175
Preferences to Creditors, ... 177
Transactions begun before, but completed within Sixty Days of Bankruptcy, ... 181

CHAPTER XVI.

SEQUESTRATION UNDER BANKRUPT ACT.

Sequestration in Scotland, ... 186
Claims for Voting, ... 188
Rules for Voting, ... 191
Claim on a Company Estate and Partners, . . . 194
Meetings of Creditors, ... 196
Special Rules as to Ranking for Payment of Dividends, . . 197
Company Estates, ... 201
Division of Estate, and Payment of Dividends, . . . 203
Settlement by Composition, ... 205
Recovery, ... 206
Discharge without Composition, ... 207
Discharge, Bankruptcy and Cessio Act, 1881, on, . . . 208
Winding up under Deed of Arrangement, ... 209
Preferences and Collusions, ... 211

CHAPTER XVII.

TRUST-DEED FOR CREDITORS, COMPOSITION-CONTRACT, AND CESSIO BONORUM.

Trust-Deed, ... 214
Composition-Contract, ... 217
Cessio Bonorum, ... 220

CHAPTER XVIII.

TRANSFER OF GOVERNMENT AND BANK STOCKS.

Government Stocks, Transfer of, ... 224
Bank Stocks, Transfer of, ... 226

APPENDIX.

Forms.

	PAGE
Foreign Bill	229
Inland Bill,	229
Bill payable by Instalments,	230
Promissory Note,	230
Banker's Cheque,	230
I.O.U.	230
Protests of Bills,	231, 232, 233
Protest of Promissory Note,	232
Receipt on a Protest,	234
Foreign Credits,	234
Marginal Credit,	234
Letter by Merchant opening a Credit abroad,	235
Letter to Bank in respect of Documents sent abroad for Collection,	235
Receipt for Judicial Consignment,	236
Receipt for Surplus of Price of Heritage sold under Powers in Bond,	236
Receipt for unclaimed Dividends,	237
Mandates,	237, 238
Procuration to sign Bills, &c.	238
Guarantees,	238, 239
Delivery Order,	240
Claim for Voting and Ranking in a Sequestration,	240
Oaths in a Sequestration,	243
Mandate to Vote in a Sequestration,	245
Accession to Trust-Deed,	246
Mortgage of Stocks,	246
STAMP DUTIES,	249-252
Memorandum as to Banking in Scotland,	253
INDEX,	259

TABLE OF CASES CITED.

PAGE

ALEXANDER *v.* Badenoch, 1843, 6 D. 322, . . . 102
Alexander *v.* Siger, L.R. 4 Ex. 102, ... 44
Alexander *v.* Yuille, 1873, 1 R. 185, ... 211
Allan *v.* Pattison, 1893, 21 R. 195, ... 220
Alston's Trustee *v.* Royal Bank, 1893, 20 R. 887, . 115, 117, 145
Anderson *v.* M'Call, 1866, 4 Macph. 765, ... 142
Anderson *v.* Walker, 1842, 4 D. 1180, ... 182
Anderson *v.* Western Bank, 1859, 21 D. 230, . . . 127
Anderson's Trs. *v.* M'Gregor's Exrs., 1893, 21 R. 7, . . 101
Anderson's Trs. *v.* Somerville and Co. Ltd., 1899, 1 F. 90, . 177

BALFOUR *v.* Pedie, 1841, 3 D. 612, ... 187
Ballantyne *v.* Carter, 1842, 4 D. 419, ... 106
Bank of Scotland *v.* Lamont and Co., 1889, 16 R. 769, . . 53
Bank of Scotland *v.* Stewart and Ross, 1811, F.C. . . 182
Bank of Scotland *v.* Taylor's Trs., 1859, 21 D. 1004, . . 64, 65
Bartsch *v.* Poole, 1895, 23 R. 328, ... 59
Bell's Trs. *v.* Bell, 1884, 12 R. 85, ... 123
Bell's Trs. *v.* Copland, 1896, 23 R. 650, . . . 169
Black *v.* Watson, 1881, 9 R. 167, ... 173
Blair *v.* Horn, 28th Nov. 1868, ... 215
Blair *v.* North British and Mercantile Ins. Co., 1889, 16 R. 325, 189
Blake *v.* Douglas, 1860. 23 D. 15, ... 64, 134
Blincow's Trustee *v.* Allan and Co., 1833, 7 W. & S. 57, . . 178
Bobbet *v.* Pinkett, L.R. 1 Ex. D. 368, ... 74
Bonar *v.* Macdonald, 1850, 13 D. (H.L.) 26, . . . 99
Borthwick *v.* Scottish Widows' Fund, 1864, 2 Macph. 595, . 134
Bovill *v.* Dixon, 1854, 16 D. 619, and 1856, 19 D. (H.L.) 9, . 144
Boyle, Petitioner, 1885, 12 R. 1147, ... 209
Bremner, Petitioner, 1900, 2 F. 1114, ... 209
British Guarantee Association *v.* Western Bank, 1853, 15 D. 834, 99
British Linen Co. *v.* Carruthers, 1883, 10 R. 923, . . 38, 76
British Linen Co. *v.* Gourlay, 1877, 4 R. 651, . . . 198
British Linen Co. *v.* Menteith, 1858, 20 D. 557, . . . 116

PAGE

British Linen Co. *v.* Rainey's Trustees, 1885, 12 R. 825, . . 38, 40
British Linen Co. *v.* Thomson, 1853, 15 D. 314, . . 109, 117
Broddelius *v.* Grischotti, 1887, 14 R. 536, ... 30, 64
Brown *v.* Sutherland, 1875, 2 R. 615, ... 44
Bryant and Others *v.* La Banque du Peuple, 1893 (App. Ca.) 170, 44
Bryce *v.* Young's Executors, 1866, 4 Macph. 312, . . . 77
Buchanan *v.* Dennistoun, 1831, 9 S. 557, and 1835, 13 S. 841, . 105
Buchanan *v.* Wallace, 1882, 9 R. 621, ... 208
Buist and Others *v.* Scottish Equitable Co., 1878, 5 R. (H.L.) 64, 135
Burns *v.* Burns, 1879, 7 R. 355, ... 166

Cabbell *v.* Brock, 1828, 3 W. & S. 75, ... 257
Calderhead *v.* Freer and Dobie, 1890, 17 R. 1098, . . . 221
Cameron *v.* French, 1893, 20 R. 966, ... 95
Campbell *v.* Purdie, 1895, 22 R. 443, ... 5
Campbell's Trustee *v.* De Lisle's Executors, 1870, 9 Macph. 252, . 166
Campbell's Trustees *v.* Hudson's Executor, 1895, 22 R. 943, . 64
Campbell's Trustees *v.* Whyte, 1884, 11 R. 1078, . . . 132
Carter *v.* Johnstone, 1886, 13 R. 698, ... 177
Carter *v.* M'Laren, 1871, 9 Macph. (H.L.) 49, . . . 212
Chamberlain *v.* Young and Another, 1893, 2 Q.B. (C.A.) 206, . 34
Christie *v.* Royal Bank, 1841 (Ross' Leading Cases), . . 112
Clapperton and Co. *v.* Anderson, 1891, 8 R. 1004, . . 95
Clarke *v.* Crockatt and Co., 1883, 11 R. 246, . . . 209
Clark *v.* Hinde, Milne, and Co., 1884, 12 R. 347, . . . 188
Clark and Co. *v.* West Calder Oil Co., 1882, 9 R. 1017, . . 125
Clydesdale Bank *v.* Anderson, 1890, 27 S.L.R. 493, . . 204
Clydesdale Bank *v.* M'Lean, 1883, 10 R. 719, aff. 9 App. Ca. 95, . 31
Clydesdale Bank *v.* Royal Bank, 1876, 3 R. 586, . . . 79
Cochrane *v.* Lamont's Trustee, 1891, 18 R. 451, . . . 14
Commercial Bank *v.* Lady Parish School Board, 1878, not reported, 120
Commercial Bank *v.* Pattison's Trustees, 1891, 18 R. 476, . 114
Commercial Bank *v.* Pollock's Trustees, 28th July 1828, . . 257
Commercial Bank *v.* Rhind, 1860, 22 D. (H.L.) 2, . . 110
Commercial Bank *v.* Speedie's Trustees, 1885, 13 R. 257, . . 193
Coutts' Trustees and Doe *v.* Webster, 1886, 13 R. 1112, . . 178
Cowdenbeath Coal Co. *v.* Clydesdale Bank, 1895, 22 R. 682, . 183
Cowper's Trustees *v.* National Bank, 1889, 16 R. 412, . . 110
Craig and Rose *v.* Delargy, 1879, 6 R. 1269, . . . 139
Crawford, 24th February 1749, M. 875, ... 255
Crawford *v.* Muir, 1873, 1 R. 91, aff. 1875, 2 R. (H.L.) 148, . 62
Crosbie's Trustees *v.* Wright, 1880, 7 R. 823, . . . 85
Cruickshank *v.* Thomas, 1893, 21 R. 257, ... 217
Culcreugh Cotton Co., 1822, 2 S. 47, ... 257

PAGE

Dawson *v.* Thorburn, 1888, 15 R. 1891, ... 176
Devagne *v.* Noble, 30th July 1816, ... 111
Dominion Bank *v.* Anderson and Co., 1888, 15 R. 408, . . 62
Dominion Bank *v.* Bank of Scotland, 1891, 18 R. (H.L.) 21, . 62
Dryborough *v.* Macdonald, 1893, 20 R. 396, . . . 196
Dumbreck *v.* Stevenson, 1861, 23 D. (H.L.) 1, . . . 156
Duncan *v.* Mitchell and Co., 1893, 21 R. 37, . . . 130
Duncanson *v.* Jefferis' Trustee, 1881, 5 R. 863, . . . 132
Dunlop v. Hamilton, 1810, 15 F.C. 497, ... 37
Durie's Executrix *v.* Fielding, 1893, 20 R. 295, . . . 30

Ewart *v.* Latta, 1865, 3 Macph. (H.L.) 36, . . . 97

Falconer *v.* Westland, 1863, 1 Macph. 704, . . 100, 110
Ferguson, Davidson, and Co. *v.* Jolly's Trustees, 1880, 7 R. 500, . 29
Ferguson *v.* Rodger, 1895, 22 R. 643, ... 122
Ferrier *v.* British Linen Co., 1807, 14 F.C. 29, . . . 151
Findlay *v.* Currie, 1850, 13 D. 278, ... 51
Fleming's Trustees *v.* M'Hardy, 1892, 19 R. 542, . . . 217
Forbes and Co., Sir W., 1st March 1791, . . . 178, 179
Forbes, Sir W., *v.* Macnab, 1816, 19 F.C. 137, . . . 106
Forbes *v.* Robb, 1858, 21 D. 79, ... 134
Forbes' Executor *v.* Western Bank, 1854, 16 D. 807, . . 92
Forbes and Welsh *v.* Forbes, 1894, 21 R. 630, . . . 121
Forsyth, 1883, 10 R. 1061, ... 187
Fraser *v.* Aberdeen Banking Co., 1826, 4 S. 762, . . . 226
Fraser *v.* Bannerman, 1853, 15 D. 757, ... 35, 45

Gallacher *v.* Ballantyne, 1876, 13 S.L.R. 496, . . . 165
Gillon *v.* Caesar, 1882, 10 R. 59, ... 190
Gilmour *v.* Bank of Scotland, 1880, 7 R. 734, . . . 114
Gilmour *v.* Finnie, 1832, 11 S. 193, ... 97
Gordon *v.* Glass, 1848, 10 D. 1129, ... 32, 33
Gordon *v.* Kerr, 1898, 25 R. 570, ... 53
Gordon *v.* M'Gubbin, 1851, 13 D. 1154, ... 194
Gourlay *v.* Hodge, 1875, 2 R. 738, ... 184
Gourlay *v.* Mackie, 1887, 14 R. 403, ... 183
Gray *v.* Gray's Trustees, 1895, 22 R. 326, . . . 221
Gray's Trustees *v.* Royal Bank, 1895, 23 R. 199, . . . 152

Hamilton *v.* Freeth, 1889, 16 R. 1022, ... 98
Hamilton *v.* Watson, 1845 (H.L.), 4 Bell, 67, . . . 109
Hamilton *v.* Western Bank, 1856, 9 D. 152, . . 143, 145
Hannay and Sons' Trustees *v.* Armstrong Bros., 1877, 4 R. (H.L.) 43, 153
Harvie's Trustees *v.* Bank of Scotland, 1885, 12 R. 1141, . . 107

PAGE
Hatley *v.* Magistrates of Burntisland, 1861, 23 D. 881, . . 207
Hay and Kyd *v.* Powrie, 1886, 13 R. 779, ... 154
Henderson *v.* Dawson, 1895, 22 R. 895, ... 9
Henderson *v.* Henderson's Trustees, 1882, 10 R. 185, . . 215
Henderson's Trustee *v.* Auld and Guild, 1872, 10 Macph. 946, . 198
Heritable Reversionary Co. Ltd. *v.* Millar, 1892, 19 R. (H.L.) 43, 186
Heritable Securities Investment Co. *v.* Wingate and Co.'s Trustee, 1880, 7 R. 1094, ... 130
Hogart *v.* Smart's Trustee, 1882, 9 R. 964, . . . 132
Hood *v.* Stewart, 1890, 17 R. 749, ... 47
Horsburgh *v.* Ramsay and Co., 1885, 12 R. 1171, . . . 179

Inglis *v.* Robertson and Baxter, 1898, 25 R. (H.L.) 870, . . 141
Ireland *v.* North of Scotland Banking Co., 1880, 8 R. 215, . 76

Jaffray *v.* Fleming, 1883, 10 R. 719, ... 222
Jameson *v.* Sharp, 1887, 14 R. 643, ... 134
Johnston *v.* Commercial Bank, 1858, 20 D. 790, . . . 116
Johnston *v.* Grant, 1844, 6 D. 875, ... 106
Jones *v.* Peppercorn, 1858, 28 L.J. Ch. 153, . . . 145

Keddie *v.* Christie, 1848, 11 D. 145, ... 85
Kemp *v.* Shaw, 1824, 3 S. 104, ... 115
Kennedy *v.* Rose, 1863, 1 M. 1042, ... 85
Kennedy *v.* Thomas, 1894, 2 Q.B. 759, ... 52
Kirkland *v.* Brown, 1861, 23 D. 363, ... 57

Lang *v.* Brown, 1859, 22 D. 113, ... 112
Lennox *v.* Campbell, 1815, F.C. 97
Liddell *v.* Sir W. Forbes and Co., 1820, 1 Bell, 69, . . 111
Life Association of Scotland *v.* Douglas, 1886, 13 R. 910, . . 109
Lindsay *v.* Giles, 1844, 6 D. 771, ... 2
Lochhead *v.* Graham, 1883, 11 R. 201, . . . 163, 164
Low *v.* Baxter, 1851, 13 D. 1349, ... 190
Lucas' Trustees *v.* Beresford's Trustees, 1892, 19 R. 943, . . 217
Lucas' Trustees *v.* Campbell and Scott, 1894, 21 R. 1096, . . 161
Luke *v.* Wallace and Others, 1896, 23 R. 634, . . . 125
Lyons *v.* Anderson, &c., 1880, 8 R. 24, ... 168

M'Adam *v.* Martin's Trustees, 1884, 12 R. 358, . . . 205
Macbride *v.* Stevenson, 1884, 11 R. 702, . . . 206, 218
M'Donald *v.* Union Bank, 1864, 2 Macph. 963, . . . 73
M'Dougall's Trustees *v.* Gibbon, 1889, 16 R. 740, . . . 180
M'Ewen *v.* Smith, 1849, Ross' Leading Cases, ii. 91, . . 142
M'Farlane *v.* Robb, 1870, 9 Macph. 370, ... 153

PAGE
Macfarlane's Trustees *v.* Miller, 1898, 25 R. 1201, . . 85
M'Kenzie *v.* British Linen Co., 1881, 8 R. (H.L.) 8, . . 50
Mackenzie *v.* Ewart, 1891, 18 R. 925, ... 222
M'Laren's Trustees *v.* National Bank, 1897, 24 R. 920, . . 217
Mackinnon *v.* Monkhouse, 1881, 9 R. 393, . . . 200
Maclean *v.* Angus Brothers, 1887, 14 R. 448, . . . 29
M'Meekin *v.* Easton, 1889, 16 R. 363, ... 44
M'Pherson *v.* Haggarts, 1881, 9 R. 306, ... 96
M'Pherson *v.* Wright, 1885, 12 R. 942, ... 58, 98
Macrae *v.* Sutherland, 1889, 16 R. 476, ... 173
Mains *v.* M'Glashan and Black, 1895, 22 R. 329, . . . 206
Mains and Another *v.* Black, 1895, 32 S.L.R. 273, . . 218
Marshall's Trustee *v.* Macneil and Co., 1888, 15 R. 762, . . 130
Maxwell and Co. *v.* Stevenson, 1831, 5 W. & S. 269, . . 145
Meiklam *v.* Walker, 1833, 13 Shaw, 53, ... 51
Merchant Banking Co. of London *v.* Phœnix Bessemer Steel Co., 5 L.R. Ch. Div. 205, ... 144
Meyer *v.* Decroix Verley et Cie., 1891, A.C. 520, . . . 40
Millar, 1877, 5 R. 144, ... 208
Miller *v.* Thorburn, 1861, 23 D. 359, . . . 115, 201
Milne's Trustees *v.* Ormiston's Trustees, 1893, 20 R. 523, . 64
Mitchell *v.* Scott, 1881, 8 R. 875, ... 181
Molleson *v.* Hutchison, 1892, 19 R. 581, ... 101
Moncrieff *v.* Hay, 1851, 14 D. 200, ... 183
More *v.* Dudgeon and Brodie, 1801, 1 Bell, 175, . . . 145
Morgan *v.* Smart, 1872, 10 Macph. 610, ... 98
Morton's Trustees *v.* Watson, 1892, 20 R. 72, . . . 98
Muir *v.* City of Glasgow Bank, 1879, 6 R. (H.L.) 21, . . 226
Murray *v.* Lee, 1882, 9 R. 1040, ... 99

National Bank *v.* Silke, 1891, 1 Q.B. 435, . . . 46, 80
National Bank of Scotland, Ltd. *v.* Campbell, 1892, 19 R. 885, . 106
National Bank of Scotland, Ltd. *v.* Cowan, 1893, 21 R. 4, . 203
National Bank of Scotland, Ltd. *v.* Dickie's Trustee, 1895, 22 R. 740, 146, 149
National Bank of Scotland, Ltd. *v.* Dixon and Another, 1893, 21 R. 4, 87
Neilson's Trustees, 1883, 11 R. 119, ... 83
North-Western Bank *v.* Poynter and Son and Another, 1894, 22 R. 1, 140
Northern Heritable Securities Invest. Co. *v.* Whyte, 1888, 16 R. 100, 208

Ogilvie and Son *v.* Taylor, 1887, 14 R. 399, . . . 215
Orme *v.* Diffors, 1833, 12 S. 149, ... 10

Parkinson, 1889, 5 T.L.R. 562, ... 116
Paterson *v.* Bonar, 1844, 6 D. 987, ... 111

PAGE

Paterson *v.* Paterson, 1898, 25 R. 144, ... 83
Paterson Brothers *v.* Gladstone, 1891, 18 R. 403, . . . 43
Paterson's Trustee *v.* Paterson's Trustees, 1891, 19 R. 91, . . 185
Patten *v.* Royal Bank, 1853, 15 D. 617, ... 200
Paul *v.* Allison, 1841, 3 D. 874, ... 65
Paul and Thain *v.* Royal Bank, 1869, 7 Macph. 361, . . 151
Pendreigh, 1875, 2 R. 769, ... 208
Phillips, 1885, 13 R. 91. 209
Provincial Assurance Co. *v.* Pringle, 1858, 20 D. 465, . . 95

Queen *v.* Sir Chas. Reed, Law Rep. 5 Q.B.D. 483, . . 119

Reddie *v.* Williamson, 1863, 1 Macph. 228, . . 113, 114
Reid, 10th July 1828, ... 201
Reid *v.* Graham, 1894, 21 R. 935, ... 223
Reid *v.* Strathie, 1887, 14 R. 847, ... 190
Ritchie *v.* Clydesdale Bank, 1886, 13 R. 866, . . . 76
Ritchie *v.* Maclachlan, 1870, 8 Macph. 815, . . . 161
Robertson's Trustee *v.* Royal Bank, 1898, 18 R. 12, . . 150
Rose *v.* Falconer, 1868, 6 Macph. 960, ... 177
Roy *v.* Campbell, 1850, 12 D. 1028, ... 65
Royal Bank of Scotland, 1894, 2 Q.B. 715, . . . 72
Royal Bank of Scotland *v.* Millar and Co.'s Trustees, 1882, 9 R. 679, 199
Royal Bank *v.* Saunders and Son's Trustees, 1882, 9 R. (H.L.) 67, 145, 194
Russell *v.* Banknock Coal Co., 1897, 24 R. 1009, . . . 40

Scottish Heritable Securities Co. *v.* Allan and Others, 1876, 3 R. 333, ... 130
Scottish Heritages Co. *v.* N. B. Property Invest. Co., 1885, 12 R. 550, 168
Scottish Provident Institution *v.* Cohen and Co., 1888, 16 R. 112, 181
Selkirk *v.* Service, 1880, 8 R. 29, ... 211
Service *v.* Youngman, 1867, 6 Macph. 172, . . . 59
Shand, Petitioner, 1882, 19 S.L.R. 562, ... 209
Shaw *v.* Wright, 1877, 5 R. 245, ... 155
Simpson *v.* Fleming, 1860, 22 D. 679, ... 95
Simpson *v.* Jack, 1888, 16 R. 131, ... 223
Simson *v.* M'Ewan, 1883, 10 R. 1247, ... 4
Sinclair, Moorhead, and Co. *v.* Wallace and Co., 1880, 7 R. 874, . 91
Smith *v.* Ogilvie, 1821, 1 S. 159, ... 99
Smith Sligo *v.* Dunlop and Co., 1885, 12 R. 907, . . . 124
Smith and Co. *v.* Smith, 1889, 16 R. 392, ... 180
Standard Property Investment Co. *v.* Dunblane Hydropathic Co., Ltd., 1884, 12 R. 328, ... 188
Stevin *v.* Reynolds and Co., 1891, 18 R. 422, . . . 175
Stewart, Sir W. D., *v.* Central Bank of Scotland, 1859, 21 D. 1180, 92

PAGE
Stewart *v.* Gibson's Trustees, 1880, 8 R. 270, . . . 168
Stewart *v.* Robertson, 1852, 15 D. 12, ... 65
Stewart's Trustees *v.* Salvesen, 1900, 2 F. 983, . . . 174
Stirling Stuart *v.* Stirling Crawfurd's Trustees, 1885, 12 R. 610, . 5
Stiven *v.* Scott and Simson, 1871, 9 Macph. 923, . . 180, 184
Stocks *v.* M'Lagan, 1890, 17 R. 1122, ... 101
Struthers *v.* Commercial Bank of Scotland, 1842, 4 D. 460, . 81
Stuart *v.* Auld, 1851, 13 D. 1337, ... 202
Summers, 1843, 6 D. 286, ... 59
Swinburne *v.* Western Bank, 1856, 18 D. 1025, . . . 91

Taylor *v.* Farrie, 1855, 17 D. 639, ... 183
Taylor's Trustees *v.* Paul, 1888, 15 R. 740, . . . 152
Teenan's Trustees *v.* Teenan, 1886, 13 R. 833, . . . 172
Tennant *v.* Crawford, 1878, 5 R. 437, ... 33
Tennant *v.* Miller, 1897, 4 S.L.T. 440, ... 177
Thomson *v.* Scoular, 1882, 9 R. 430, ... 168
Tod and Son *v.* Merchant Banking Co. of London, 1883, 10 R. 1009, 139

Union Bank *v.* National Bank, 1886, 14 R. (H.L.) 1, . . 128
University of Glasgow *v.* Yuill's Trustees, 1882, 9 R. 643, 199, 218
Urquhart *v.* Macleod's Trustees, 1883, 10 R. 991, . . . 168

Van Diemen's Land Bank *v.* Victoria Bank, L.R. 3 P.C. 526, 37

Wallace *v.* Davies, 1853, 15 D. 688, ... 133
Wallace *v.* Gibson, 1895, 22 R. (H.L.) 56, . . . 94
Ex parte Waring, 19 Vesey, 345, and 2 Rose, 182, . . 194
Waterston *v.* City of Glasgow Bank, 1874, 1 R. 470, . . 77
Watson *v.* Duncan, 1879, 6 R. 1247, ... 127
Welch's Executors (Petitioners), 1896, 23 R. 772, . . . 123
White *v.* Briggs, 1843, 5 D. 1164, ... 179
Wight's Trustees *v.* Jamieson, 1863, 1 Macph. 815, . . 216
Wilson *v.* Tait, 1840, 1 Rob. 137, ... 107
Witham *v.* Teenan's Trustees, 1884, 11 R. 776, . . . 190
Wood *v.* Cranston and Elliot, 1891, 18 R. 382, . . . 187
Woods, Parker, and Co. *v.* Ainslie, 1860, 22 D. 723, . . 219
Wylie and Lochhead *v.* Hornsby, 1889, 16 R. 907, . . 106

Young *v.* Clydesdale Bank, 1889, 17 R. 231, . . . 96
Yuill *v.* Scott, 1827, 6 S. 137 and 1831, 5 W. & S. 436, . . 101

HANDBOOK

OF

BANKERS' LAW.

CHAPTER I.

OF MERCANTILE WRITS, AND THE EXECUTION OF DEEDS, AND PARTIES WHO MAY GRANT THEM.

The legal writings which have a direct bearing on the transactions of a banker are divisible into two great classes, namely, first, Documents which regulate mercantile transactions, termed, in legal phraseology, writings *in re mercatoria;* and second, Writings or deeds in the preparation and execution of which certain formalities or solemnities are required by law in order to make them effectual. These deeds may be stated generally as comprehending all conveyances of heritages and moveables, bonds for borrowed money, agreements, and all contracts of whatever nature.

Writings in re Mercatoria.—All documents necessary for carrying through commercial transactions are privileged by law in respect that they are effectual though not signed before witnesses, they may be signed by initials or mark, and, of course, they have no testing clause. The ground on which this privilege rests is simply that the operations of commerce may not be impeded by the preparation of formal documents in transactions intimately connected with trade. Wherever these documents, therefore, are intelligibly expressed, they will be binding on the granter, unless the authenticity of the signature is successfully impugned. Among these writings are com-

prehended bills, promissory notes (but to warrant *summary diligence*, bills and notes must be dated and signed), drafts, cheques, mandates, receipts, and all documents connected with the sale of goods, or to which the exigencies of trade give rise. Procurations occasionally fall under the class of privileged documents. Of most of these documents we shall have occasion to treat afterwards.

Execution of Deeds.—The Conveyancing (Scotland) Act, 1874, having introduced important alterations on this subject, it will be proper to describe the practice prior to 1st October 1874, when the Act came into operation, and the changes which that Act introduced.

Practice prior to 1st October 1874 (and which may still be followed).—Certain particulars attending the execution of a deed required to be accurately stated in the testing clause of the document, and the omission of any of them was in effect a vitiation of the deed. Following the order of the testing clause, the first essential point was the *full name and designation of the writer of the deed.* Although the writer's name and designation were generally set forth in the testing clause, it was not indispensable that this should be done if they were evident from some other part of the deed. The testing clause might be written by a different person from the writer of the body of the deed, and in such a case it was not necessary that the writer of the testing clause should be mentioned. On this point see the case of *Lindsay* v. *Giles*, 1844, 6 D. 771. The correct practice was also to insert the name and designation of the writer of the testing clause where it is filled up by a different person; and this course is still customary. Where a deed was partly printed or engraved or lithographed and partly written, it was enough to design the person who had inserted the written part of it. In a holograph writing it was usual to state that it was written with the granter's own hand; but this was not essential. When the deed consisted of more than one

sheet, the number of pages on which it was written required to be stated in the testing clause. The next point calling for observation is the *subscription of the granter*. Where the deed consists of more than one *sheet* it required and still requires to be signed on each page by the granter, and any addition or alteration, by way of marginal note, must be authenticated by the signature of the granter, and should be noticed in the testing clause. It has been long settled that where the deed is engrossed on one sheet only, though extending over more than one page, it is quite enough that the last page be signed by the person executing it; but the general practice is to sign each page. In signing a deed, the granter adhibits his usual signature merely; that is to say, it is not necessary that he write his full Christian name and surname unless that is his usual mode of signing documents. Where the granter cannot write, a *deed* executed by a mark is ineffectual. The only mode (known to the law) in which a person who could not write could execute a deed was—observe we are speaking of the practice prior to 1st October 1874—that it should be subscribed by two notaries on behalf of the granter in the presence of four witnesses, who must know that the notaries are duly authorised to sign, this authority being generally evidenced by the granter touching the pens of the notaries and requesting them to sign for him. Where the party himself subscribed, two witnesses above the age of fourteen (who, after the passing of the Titles to Land Consolidation Act, 1868, might be females) required to be present to attest the signature. The witnesses signed the last page of the deed at the left-hand side, adding after the signature the word "witness." Where several granters signed at the same time, the witnesses subscribed only once; but if the deed was signed at different times the witnesses required to subscribe at each separate attestation. An accurate designation of the witnesses must be contained in the testing clause by inserting their occupations and places of abode. A misnomer of the witnesses in the testing clause, or an erroneous designation of them, rendered the deed a mere nullity. The witnesses

should always know the party executing a deed; at least they ought to know that the party designed in the deed is the party who executes it. Difficulty frequently arises in practice from the witnesses not knowing the party whose signature they attest; and in cases where the signature is challenged, the evidence of such witnesses is useless. The insertion of the place and date of subscription of a deed is not a statutory solemnity, but it is the invariable practice to mention them in the testing clause; and they ought to be stated with accuracy. The effect of a deed may depend upon its date.

When a deed, such as a bond of credit, is signed by a party resident in England, it is usual to execute it according to the forms required by the law of England as well as those in use in Scotland. In addition to the signature of the granter, the deed must be authenticated by his seal, and delivered as his act and deed in the presence of two witnesses. A probate is written on the left-hand side of the deed, in the following terms:—"Signed, sealed, and delivered by the above-named A. B., before and in presence of." The witnesses sign immediately under it, adding to their signatures their places of residence and professions. The following is an example of this mode of execution:—

JOHN SMITH. (*Seal.*)

Signed, sealed, and delivered by the above-named John Smith before and in presence of

ANDREW PEARSON, *of Newcastle, Banker.*
JAMES WILSON, *of Newcastle, Warehouseman.*

The Changes introduced by the Conveyancing (Scotland) Act, 1874.—Among other alterations, that Act provides that all deeds, instruments, or writings may now be validly executed by the subscription of the granter, before two witnesses (who ought *not* to be interested parties; although such witnesses have been held not legally disqualified,—*Simson* v. *M'Ewan*, 1883, 10 R. 1247). The witnesses (who may be females) must be either named or designed in the body of the deed or the

testing clause, or their designations must be appended to or follow their subscriptions. But it is not essential (though advisable) that such designation be added by the witnesses themselves, for it may be made at any time before the document shall have been recorded in any register for preservation, or shall have been founded on in any court. Prior to the Act, if a deed was attended by any informality of execution, it was altogether invalid; but it is provided by the Act that no deed subscribed by the granter, and bearing to be attested by two witnesses, shall be invalid because of any informality of execution, but the burden of proving that the deed was subscribed by the granter and witnesses by whom it bears to be attested lies on the person using or upholding the deed. The deed will accordingly be validated by such proof. The signature must be a proper signature. The use of a stamp which the granter may be in the habit of using in consequence of a difficulty in writing is not sufficient,—*Stirling Stuart* v. *Stirling Crawfurd's Trustees*, Feb. 6, 1885, 12 R. 610.

As regards the execution of deeds, (1) where the granter is unable to write, and (2) where he is blind (but a blind person may sign in the ordinary way, in which case the deed does not require to be read over to him, although it would be prudent to do so), the Act above referred to legalises (without prejudice to the previous practice, which may still be followed) the subscription by the authority and in the presence of the granter, of *one notary*, or Justice of the Peace, in either case before two witnesses, as sufficient execution by the granter. The parish minister may act as a notary in testamentary writings of all kinds in his own parish. The witnesses must hear the deed read over to the granter, and they should see or hear distinct authority given to such notary or Justice of the Peace to execute the deed on behalf of the granter, and the docquet must contain both these facts. It is essential that the docquet be holograph. In *Campbell* v. *Purdie*, 1895, 22 R. 443, a deed notarially executed was held invalid because the docquet was not holograph; nor could the defect, in that case, be remedied after the testator's death. The necessary docquet is given below.

Form of Docquet.—"By authority of the above-named and designed *A. B.*, who declares that he cannot write on account of sickness and bodily weakness (*or*, never having been taught, *or otherwise as the case may be*), I, *C. D.* (*design him*), Notary Public (*or* Justice of the Peace for the county of), subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before named and designed, who subscribe this docquet in testimony of their having heard (*or* seen) authority given to me as aforesaid, and heard these presents read over to the said *A. B.*

"*E. F.*, witness. (Signed) *C. D.*, Notary Public [*or* Justice of the
"*G. H.*, witness. Peace, *or* Parish Minister]."

Persons who may grant Deeds and come under Personal Obligations.—A few observations may be offered as regards the persons who may grant deeds and come under personal obligations. It is indispensable that the person who executes a deed should be capable of giving an *intelligent* and *voluntary* consent, and that he has sufficient knowledge to understand what he is doing or parting with by signing the deed. It is almost unnecessary to say, that a deed granted by a person under a legal incapacity, such as imbecility or nonage, is reducible by one having any interest; and the same observation applies to all deeds executed through force, fear, or fraud, or under essential error.

Pupils and Minors.—Incapacity from nonage applies to *pupils* and *minors*, who cannot grant deeds without the consent of their legal guardians. Pupils are legally incapable of acting during the years of pupillarity, which, in the case of females, continues until the completion of the twelfth year; and in the case of males, till the completion of the fourteenth year. No act by a pupil, or action raised in his name, is effectual unless his guardian be a party to it. Deeds on behalf of pupils can be granted only by their father, as tutor and administrator-in-law, or, after his death, by tutors nominated by him or legally appointed to the pupils, or by a factor *loco tutoris*, where no

tutors have been appointed. By the Guardianship of Infants Act of 1886, on the death of a pupil's father the surviving mother is its guardian alone, if no guardian has been appointed by the father; jointly, if a nomination has been made by the father, unless such party is dead or refuses to act, when the Court may appoint a guardian to act along with the mother. The signature of a pupil to a deed is absolutely null, but the nullity of the deed cannot be pleaded by a person who has obtained the deed from him. The tutor of a pupil acts for him in all matters, his powers extending to the pupil's person and estate; *e.g.*, he may (1) receive or discharge debts; (2) make up titles; (3) grant leases, but, unless under special powers, he cannot grant a lease to endure beyond his term of office; but he cannot dispose of his ward's heritage, except with the special authority of the Court of Session, on showing that the sale is absolutely necessary.

Minors—that is to say, males above the age of fourteen, and females above twelve, and in either case under twenty-one, are held capable of consent, but as requiring legal protection in respect of immature judgment. The minor's father is his legal administrator. The authority of a curator, unlike that of a tutor, does not extend to the *person* of the minor. Deeds granted by minors who have no curators, and by minors with consent of their curators, are valid, and only reducible on the ground of minority and lesion, if an action to set them aside be brought within four years of the minor attaining majority. Deeds granted by curators alone, or by a minor having curators, without their consent, are null, and reducible at any time within the forty years' prescription. A minor, however, may carry on business or a trade; and bills, and other mercantile documents necessary for the carrying on of the business, are valid, though granted without the consent of his curators. Where a minor, with intent to deceive, holds himself out as a major, his obligations will be binding on him. He cannot, however, test on property which is heritable *sua natura*, even with the consent of his curator. It ought to be kept in view that, as in the case

of pupils, deeds challengeable by minors are, nevertheless, binding on the other contracting parties.

Married Women.—1. *Common Law.*—Before the Married Women's Property Act, 1881, on marriage two rights arose to the husband in reference to his wife's property. The one was his *jus mariti*, which gave him the absolute ownership in the moveable property possessed by her at her marriage, and all moveable property she afterwards acquired *stante matrimonio*. The rents of her heritable estate were held to be moveable when they became due, and so fell under the *jus mariti*. The other right was called the *right of administration*, which constituted him his wife's curator, and rendered necessary his consent to all deeds disposing of her own separate property, whether heritable or moveable, unless his right of administration was expressly excluded. But these rights might be excluded by an ante-nuptial marriage-contract, or by any deed under which the wife succeeded to the property, with regard to that property.

The husband was liable for moveable debts contracted by his wife before marriage, and also for the interest on heritable debts due prior to the marriage; and, if her heritable property had been conveyed to him, he was liable also for the wife's heritable debts. The husband, however, was not liable for furnishings to his wife while she lived in family with her father previous to the marriage. If the debts contracted by a wife before marriage be not paid before the dissolution of the marriage by her death, the husband would not be liable for them, unless so far as he might be enriched by the marriage beyond a reasonable portion. A wife was not liable personally, *stante matrimonio*, for debts contracted prior to marriage, but her separate estate could be at once attached, and her personal liability revived on the dissolution of the marriage.

A married woman was incapacitated from selling, disposing of, or gifting her heritage, and also any moveable property belonging to her, from which her husband's *jus mariti* had been excluded, except with consent of her husband, but if his right

of administration had been excluded or renounced, she might dispose of her separate property without his consent. It is usual, over and above the husband's consent to a deed by his wife conveying her heritage, to get her to ratify it in the presence of a magistrate and witnesses while her husband is not present. This is an oath by the wife that she has not been compelled through force or fear of her husband to grant the deed. But, notwithstanding ratification by the wife, if it be the fact that she was really compelled by her husband to grant the deed, and also the ratification, the ratification and the deed would still be reducible on this being proved. A wife could, without the consent of her husband, dispose of her own property, heritable and moveable, by will or *mortis causa* deed.

Even apart from the common law, personal obligations granted by a married woman are, in general, null and void, and ratification of these by the wife during the marriage does not make them effectual. The husband's consent does not validate such obligations. While by the Married Women's Property (Scotland) Act, referred to below, a married woman's property remains her own estate notwithstanding her marriage, the Act has not altered the former law as to the personal obligations of married women. To the above general rule there are several exceptions. *Firstly*, such obligations are good if *in rem versum*. The recent case of *Henderson* v. *Dawson*, 1895, 22 R. 895, may be referred to for a legal definition of the words *in rem versum*, in this relation. It was laid down in that case that the obligation must be undertaken by the wife with a view to her own interest, and not for the exclusive advantage of the contracting party, nor of another. Whether the transaction eventually proves to be beneficial to her is immaterial; so long as it is entered into with a view to her own advantage and refers to her separate estate, it will be binding upon her. A married woman, however, if she insist upon the other contracting party fulfilling the contract, must perform her own part. *Secondly*, if she fraudulently holds herself out as unmarried, and so induces any one to contract with her, she cannot repudiate

the obligations she has undertaken. *Thirdly*, where a wife commits a crime for which she is fined, her estate may be attached in payment. *Fourthly*, if the husband be insane, outlawed, or resident abroad, the wife may carry on business, and grant personal obligations, which will render her and her estate liable to diligence; *vide Orme and Differs*, 1833, 12 S. 149. *Fifthly*, if a married woman sell her heritage and refuse to grant a disposition to the purchaser, he may bring an action of adjudication in implement against her. *Lastly*, where she has obtained a judicial separation or protection order, as after mentioned.

2. *Statute Law.*—By the Conjugal Rights Act, 1861, and the Married Women's Property Acts, 1877 and 1881, various important alterations have been made on the law of husband and wife. The Conjugal Rights Act provides that a wife deserted by her husband may, at any time after such desertion, apply to the Court of Session for an order to protect property which she has acquired or may acquire by her own industry, and property which she has succeeded to, or may succeed or acquire right to, against her husband or his creditors, or any person in or through his right. The petition is intimated in the Minute-Book of the Court, and executed against the husband in common form. The husband, or any of his creditors, may lodge answers to the petition. If no answers are lodged, the Lord Ordinary shall require evidence of such desertion; and, on being satisfied thereof, pronounce an interlocutor, giving to the wife protection of her property against her husband and all creditors or persons claiming under or through him. If answers are lodged, the Lord Ordinary may, on considering the same and hearing parties, allow them a proof of their averments; and, if satisfied, after proof of the fact of such desertion, that the same was without reasonable cause, he shall pronounce an interlocutor giving to the wife protection as aforesaid, and shall appoint intimation thereof to be made in one or more newspapers published within the county within which the wife is resident, or in such other newspapers as he shall appoint.

The husband, or any creditor, who has *not* lodged answers, may apply to the Court by petition for a recall of the protection; but such recall, if granted, does not affect any right or interest onerously and *bona fide* acquired by any third party from the wife during the subsistence of the order. All interlocutors of the Lord Ordinary may be brought under review of either Division of the Court; but it is provided that, notwithstanding any reclaiming note, the protection shall take effect when intimated, unless the Lord Ordinary, at the time of pronouncing it, or within forty-eight hours thereafter, order that his interlocutor shall not take effect till the advising of the reclaiming note, or such other period as he may think fit. The order of protection, where there has been appearance by the husband, shall continue operative until such time as the wife shall again cohabit with her husband; or until the Lord Ordinary, upon a petition by the husband, shall be satisfied that he has ceased from his desertion and cohabits with his wife; and the Lord Ordinary may require him to find security, for such period as may be appointed, that he shall continue to cohabit with her, and upon the Lord Ordinary being satisfied, and security found, if required, he shall recall the order of protection; but such recall shall not affect any right or interest acquired by the wife while the said order subsisted, which right or interest shall remain vested in her, exclusive of her husband's *jus mariti* and right of administration; nor shall it affect any right or interest acquired by a third party during such period, or by any party through or from her, while the said order subsisted; and until such order be recalled it shall not be competent for the husband to institute an action of adherence against his wife.

After an interlocutor of protection is pronounced and duly intimated, the property of the wife belongs to her as if she were unmarried, but the protection does not extend to property acquired by the wife, of which the husband, or his assignee or disponee, has, before the date of presenting said petition, obtained full and complete lawful possession; nor does it affect

the right of any creditor of the husband over property which he has, before the date thereof, duly attached by arrestment, followed by a decree of furthcoming, or duly poinded, and of which he has carried through and reported a sale.

The order of protection, duly made and intimated, is declared to have the effect of a decree of separation, *a mensa et thoro*, in regard to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued.

The Act also provides that after a decree of separation *a mensa et thoro* is obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, in reference to which the *jus mariti* and husband's right of administration are excluded, and such property may be disposed of by her in all respects as if she were unmarried; and, on her decease, the same shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead. Should the wife again cohabit with her husband, her property shall be held to her separate use, and the *jus mariti* and right of administration of her husband shall be excluded in reference thereto; subject, however, to any agreement in writing made between herself and her husband. The wife shall, while so separate, be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married; and her husband shall not be liable in respect of any obligations or contract she may have entered into, or for any wrongful act or omission by her, incurred after the decree of separation, and during the subsistence thereof.

By the Married Women's Property Act, 1877, it is provided that "the *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her

own name, and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof." This Act also limits the liability of a husband for the antenuptial debts of his wife in marriages contracted after its date to the value of the property which he receives through her.

By the Married Women's Policies of Assurance Act, 1880, 43 and 44 Vict. c. 26, married women are enabled to effect policies on their own or their husbands' lives which, if expressed to be for her separate use, shall be exclusive of the husbands' *jus mariti* or right of administration; and they may assign such policies, either *inter vivos* or *mortis causa*. Under the same Act, a husband may effect a policy on his own life, and if *ex facie* expressed to be for the benefit of his wife or children, or both, shall vest in him, or any other person named in the policy, in trust for the wife or children, or both, as the case may be. The Act declares that the policy shall not be attachable by his creditors or revocable as a donation, or reducible on any ground of excess or insolvency; but if it be proved that the policy was effected to defraud creditors, or the husband be made bankrupt within two years from its date, the creditors shall be entitled to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.

Further important alterations in favour of married women are made by the Married Women's Property (Scotland) Act, 1881, 44 and 45 Vict. c. 21.

In the case of marriages contracted *after the passing of the Act* (18th July 1881), it is provided that the whole moveable or personal estate of the wife, whether acquired before or during the marriage, is, by operation of law, vested in the wife as her separate estate, and is not subject to the *jus mariti*. Any income of such estate is payable to the wife on

her individual receipt or to her order, and to this extent the husband's right of administration is excluded; but the wife is not entitled to assign the prospective income, or without her husband's consent to dispose of such estate, and, except on such grounds as force, fear, &c., the deeds cannot be challenged. The wife's moveable estate is not subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as clearly distinguish the same from the estate of the husband. Any money or other estate of the wife, lent or entrusted to the husband, or immixed with his funds, is to be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim (or that of her assignee,—*Cochrane* v. *Lamont's Trustee*, 1891, 18 R. 451) to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied. Nothing in these provisions excludes or abridges the power of settlement by antenuptial contract of marriage. The rents and produce of heritable property in Scotland belonging to the wife are no longer subject to the *jus mariti* and right of administration of the husband.

In the case of marriages which have taken place before the passing of the Act, its provisions do not apply where the husband has, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him; and in other cases the provisions of the Act do not apply, except that the *jus mariti* and right of administration are excluded to the extent respectively prescribed by the preceding sections (as above indicated) from all estate, moveable or heritable, and income thereof, to which the wife may acquire right *after* the passing of the Act. All persons married before the passing of the Act may declare by mutual deed that the wife's whole estate, including such as may have

previously come to the husband in right of his wife, shall be regulated by the Act; and on registration in the books of Council and Session, or of the Sheriff Court of the county where the parties reside, and advertisement once in the *Edinburgh Gazette*, and three times in each of two local newspapers, of such deed, the estate is vested in her subject to the provisions of the Act; but no such deed is of any effect as against any debt or obligation contracted by the husband prior to the date of the deed being so advertised and registered. The Act further provides that where a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff Court may, on petition, dispense with the husband's consent to any deed relating to her estate. The Act also provides that the husband of any woman who may die domiciled in Scotland is in future to have, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, and that the children of any woman who may die domiciled in Scotland are in future to have the same right of legitim in regard to her moveable estate which they have in regard to that of their deceased father. The Act does not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donation between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the Married Women's Property Act, 1877.

CHAPTER II.

OF INTESTATE SUCCESSION TO MOVEABLES, AND THE OFFICE OF EXECUTOR.

VERY important alterations have been made in the law of intestate succession by the Act of 1855; but, before entering on a statement of its leading enactments, it may be proper to advert briefly to the law of Succession.

Upon the death of a person possessed of moveable estate, it passes according to the terms of any settlement left by the deceased; and if the deceased has died intestate, it passes to the next of kin, or the descendants of such next of kin as may have predeceased him,—*i.e.*, children or grandchildren, &c. In either case, the person taking up the succession is called the executor; if appointed in a will, executor-nominate; and if decerned by the Sheriff, executor-dative. The Act 21 and 22 Vict. c. 56 regulates the procedure necessary for obtaining confirmation. The title of executor, in every case, is completed by confirmation from the Sheriff of the county in which the deceased died domiciled, except in the case of a party dying abroad, or without any fixed or known domicile, when it is completed in the Sheriff Court of Edinburgh. On obtaining confirmation, the executor has full title to uplift and administer the estate for all concerned. If, however, a moveable subject, such as the stock of a public company or a life policy, is specially conveyed to the executor in a will, he has a good title to that particular subject without confirmation. By the Confirmation and Probate Act of 1858, as amended by the Sheriff Courts Act, 1876, and the Customs and Inland Revenue Act, 1881, it is now competent to include in the inventory of any person, who shall have died domiciled in Scotland, all the personal property

of the deceased within the United Kingdom ; and on such confirmation being produced and sealed in the Probate Court of England or Ireland, as the case may be, the executor's title to the English or Irish property is complete ; *vide* 21 and 22 Vict. c. 56, secs. 9, 12, 13 ; and 39 and 40 Vict. c. 70, secs. 41, 42, 43. A like privilege has been conferred in the case of parties dying domiciled in England or Ireland, having moveable property in Scotland. The probate of the estate of such persons may include the Scotch property ; and, on its being produced in the Sheriff Court at Edinburgh, and a certificate of its production written on it by the Commissary Clerk, it has the same effect as if confirmation had been obtained in Scotland ; *vide* section 14 of the Act of 1858, 21 and 22 Vict. c. 56.

Dissolution of Marriage.—On the dissolution of a marriage by the death of the husband, survived by children of the marriage, or by children of his by any former marriage, the moveable property of the husband is divided into three parts. One of these, called the *jus relictæ*, the law gives to the widow ; another, called *legitim*, to the children of the deceased ; and the third, called the "dead's part," to the husband's next of kin. (Heritable securities are now moveable with regard to the creditor's succession, though not as to the wife's *jus relictæ*, nor are they to be computed in reckoning *legitim*, and therefore belong to the dead's part.) *Legitim* cannot be defeated by any *mortis causa* deed whatever except an antenuptial marriage-contract. The husband may, however, dispose of the dead's part by will, even to the prejudice of his children. If the marriage be dissolved by the death of the husband, *without* his being survived by children, his moveable estate is divided into *two* parts ; the one going to the wife, as her *jus relictæ ;* and the other to the husband's next of kin, failing his having disposed of it by will. The wife is also entitled to *terce ;* that is, the liferent of one-third of the husband's heritable property, *including* burgage subjects. The distinction between feu and burgage subjects is now abolished.

Where the marriage is dissolved by the death of the wife, very important alterations have been made by recent legislation. Formerly, when a wife died, her next of kin, if there were no children, could demand from the husband one-half of the goods in communion,—that is, one-half of the whole of his moveable property; but the Intestate Moveable Succession Act, 1855, provides that, where the wife predeceases her husband, her next of kin shall have no right to a share of the goods in communion. The husband, when he is the father of a child born of the wife, and heard to cry, which was at its birth or afterwards became the wife's presumptive heir, is entitled to *courtesy;* that is, a right to continue during his life in the possession of all heritages to which his wife has succeeded in the capacity of heir. This right does not extend to subjects conquest by the wife,—that is, subjects acquired by her by purchase or donation during her life. The Married Women's Property (Scotland) Act, 1881, sec. 7, provides that, after the passing of that Act, the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate as they have in that of their deceased father.

Another very important alteration has been made by the Intestate Moveable Succession Act as to the dissolution of marriage by the death of the wife. According to the old law, if the marriage was dissolved within a year and day by the death of either spouse, without a living child being born, the moveable funds were restored, as far as possible, to the parties to whom they originally belonged. But the Act provides that, though the marriage be dissolved within a year and day, the rights of parties shall be the same as if it had lasted for a longer period.

Rules of Succession.—Where a father dies intestate, leaving children, they, as next of kin of their parent, take the dead's part in addition to the legitim, and thus take equally among them the whole moveable property belonging to the father, subject to their mother's claim for one-third as *jus relictæ*, if she be

alive and has not renounced it. Where a child predeceases the parent, leaving lawful issue, such issue come in place of their parent, and take equally among them the share which would have fallen to the parent if alive; but have no claim to a share in the *legitim*. The heir, provided he is also one of the next of kin, may insist upon collating the heritage with the moveables, and then sharing equally with the next of kin, and has no claim to a share of moveables unless he do so.

Where any person, dying intestate, predeceases his father, without leaving issue, his father has a preferable right to one-half of his moveable estate, the other half going to his brothers and sisters, if any, or their descendants. Where an intestate, dying without issue, is predeceased by his father and survived by his mother, she has a preferable right to one-third of the moveable estate, the other two-thirds going to the deceased's next of kin.

Neither a mother nor any of her relations ever succeeds to her children, but the Act provides that where an intestate, dying without issue, and whose father and mother have predeceased him, does not leave any brother or sister german (*i.e.*, by the same father and mother), or brother or sister consanguinean (*i.e.*, by the same father but by a different mother), but leaves brothers and sisters uterine (*i.e.*, by the same mother but by a different father), or descendants from them, they have right to one-half of the moveable estate.

The lines of succession are—first, descendants; next, collaterals; then ascendants, with their collaterals.

Office of Executor.—In the case of a testate succession, the parties named executors in a will are confirmed in preference to all others; where no executor has been appointed under the will, the second in order are universal disponees or legatees under a settlement; third, the next of kin of the deceased; fourth, the representatives of the next of kin (*i.e.*, the issue of one who, if he had survived, would have been among the next of kin), should they not apply for confirmation; fifth, creditors

of the defunct; sixth, special legatees; and lastly, a judicial factor.

The executor is merely a trustee for all concerned, and as such has no beneficial interest in the estate. His authority exists by virtue of his confirmation, and his duty is to recover and distribute the estate of the testator, as trustee for all concerned. An executor-creditor, however, is not a trustee for all interested, but proceeds only for payment of his own debt.

The Executors (Scotland) Act, 1900, alters the position of the executors-nominate and the administration of executry estates. Under its provisions executors-nominate are, unless the trust-deed expresses the contrary, in the position of "gratuitous trustees" as defined by the Trusts (Scotland) Acts, 1861 to 1898, the Act giving them "the whole powers, privileges, and immunities," and subjecting them to "all the limitations and restrictions" of gratuitous trustees. They have therefore all the powers of investment competent to trustees (see pages 22-25), and power to assume other executors to act along with them and after them. Then (sec. 3), where a testator has not appointed an executor, or failing any person so appointed, the testamentary trustees, original or assumed, or appointed by the Supreme Court (if any), or failing them, "any general disponee or universal legatory or residuary legatee" appointed by the testator, shall be held to be his executor-nominate, and entitled to confirmation as such. On the death of a sole or last surviving trustee or executor, with any funds standing or invested in his name as trustee or executor, confirmation by his executors-nominate to his own estate shall be valid and available to such executors for recovering such funds, and for assigning and transferring them to any person legally authorised to continue the administration of the executry, or directly to the beneficiaries entitled thereto, where no other act of administration remains to be performed (sec. 6), (formerly a new application had to be made for the appointment of such executor). Where, however, executry funds remain in the name of the testator, on the death of his executor confirmation *ad non executa* is still

necessary, since in these circumstances no title to intromit with the executry funds transmits to the executors of a deceasing executor (sec. 7).

Where funds are deposited in a bank in name of a party deceased, or of his deceased executor, the bank is not bound to pay without confirmation being exhibited.

Savings banks, friendly societies, &c., may (under the Provident Nominations and Small Intestacies Act, 1883) make payment without confirmation to the nominees or representatives of deceased persons, where the sum does not exceed £100.

When payment is made by a banker under a confirmation, it is necessary to see that the particular fund has been included in the inventory, no one being warranted to pay unless the asset in his hands is confirmed. In a case of this kind, which happened with the Royal Bank, the bank was found liable to pay a second time funds in its possession which had not been included in the inventory of the estate of the party in whose name they were deposited.

Confirmation under the Small Estates Acts.—Provision has been made by the Small Estates Acts for a cheap form of confirmation for representatives, in whatever character, of deceased persons whose estates do not exceed £500. Thus the Executors (Scotland) Act, 1900 (sec. 9), provides that "it shall be competent for any person entitled to apply for confirmation under the Intestate Widows and Children (Scotland) Act, 1875, and the Small Testate Estates (Scotland) Act, 1876, as extended by the Customs and Inland Revenue Act, 1881 (sec. 34), and the Finance Act, 1894 (sec. 16), to apply to any officer of Inland Revenue duly appointed for the purpose, and the said officer shall prepare and fill up the necessary form of inventory and oath or affirmation and revenue statement appended thereto, and shall take the oath of the applicant thereto and such evidence as he may think sufficient to establish the identity and relationship or title of the applicant and the value of the estate, and where caution is required, shall also

prepare and fill up the bond of caution, and on the same being signed and such attestation of the sufficiency of the cautioner as he may consider necessary being obtained, and the said inventory and bond (if any) being duly stamped, where stamps are required, the said officer shall transmit the same, along with any testamentary writings that may be exhibited and the prescribed *ad valorem* fee chargeable on the confirmation, to the clerk of the court where confirmation falls to be issued. And the said clerk, if satisfied that the applicant for confirmation is entitled thereto, shall record the inventory and relative writs (if any) and expede confirmation, and transmit the same, with any writs which may fall to be returned, to the officer for delivery to the applicant." By the Act of 1881, where the estate and effects (without any deductions for debts or funeral expenses) does not exceed the value of £300, whoever may be the applicant for representation, the fees are restricted to 15s. In any such case where the estate and effects exceed the value of £100 the stamp duty (which covers legacy duty or succession duty) payable on the inventory is fixed at 30s. The Finance Act, 1894, extends the foregoing provisions to estates whose gross value, real and personal, does not exceed £500. Where such gross value exceeds £300 and does not exceed £500 the fixed duty is 50s.

Office of Trustee.—The Trusts (Scotland) Amendment Act, 1884 (47 and 48 Vict. c. 63), provides that, in the construction of the Trusts Acts, "trust" means and includes any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any Corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise; and "trustee" includes tutor, curator, and judicial factor.

Gratuitous trustees are those who receive no pecuniary or other consideration, and are under no obligation without special acceptance to discharge the duties. The expression also includes trustees who are appointed or who hold *ex officio*, but it does not

include a trustee for a trading company. By the Trusts Act, 1867, certain useful powers are conferred on gratuitous trustees, amongst others—

1. To appoint factors and law-agents, and to pay them a suitable remuneration.
2. To discharge trustees who have resigned, and the representatives of trustees who have died.
3. To grant leases of the heritable estate, not exceeding twenty-one years for agricultural lands and thirty-one years for minerals, and to remove tenants.
4. To uplift, discharge, or assign debts due to the trust-estate.
5. To compromise or to submit and refer all claims connected with the trust-estate.
6. To grant all deeds necessary for carrying into effect the powers vested in the trustees.
7. To pay debts due by the truster or by the trust-estate, without requiring the creditors to constitute such debts by decree where the trustees are satisfied that the debts are proper debts of the trust.

On application to the Court power may be granted to the trustees—(1) to sell the trust-estate, or any part of it; (2) grant feus or long leases of the heritable estate, or any part of it; (3) to borrow money on the security of the trust-estate, or any part of it; (4) to excamb any part of the trust-estate which is heritable. For the other important powers and immunities conferred upon the trustees reference may be made to the statute.

By the Act 60 Vict. c. 106 trustees are further empowered to make abatement or reduction, either temporary or permanent, of the rent, lordship, royalty, or other consideration stipulated in any lease of lands, houses, tenements, minerals, metals, or other subjects, and to accept renunciations of leases of any such subjects.

The powers of trustees to invest trust-funds are mainly regulated by the Act of 1884 (47 and 48 Vict. c. 63), section 3, and include (A) the purchase of (1) any of the Government stocks, public funds, or securities of the United Kingdom; (2) stock of the Bank of England; (3) any securities, the interest of which is guaranteed by Parliament; (4) debenture stock of railway companies in Great Britain, incorporated by Act of Parliament; (5) preference, guaranteed, lien, annuity, or rent-charge stock, the dividend on which is not contingent on the profits of the year, of such railway companies in Great Britain as have paid a dividend on their ordinary stock for ten years immediately preceding the date of investment; (6) stock or annuities issued by any municipal corporation in Great Britain, secured on rates or taxes levied under Act of Parliament; (7) East India stock or Colonial Government funds approved by the Court of Session, and also bonds or documents of debt of any such government, approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer; (8) feu-duties or ground-annuals: (B) in loans—(9) on the security of any of the stocks, funds, or other property aforesaid; (10) on real or heritable security in Great Britain; (11) on debentures or mortgages of railway companies in Great Britain incorporated by Act of Parliament; (12) on bonds, debentures, or mortgages, secured on rates or taxes levied under the authority of any Act of Parliament by municipal corporations in Great Britain authorised to borrow money on such security; (13) on Indian railway stock, debentures, bonds, or mortgages on which the interest is permanently guaranteed by the Indian Government, and payable in sterling money in Great Britain.

Under the Trusts (Scotland) Amendment Act, 1898, trustees may, unless specially prohibited by the constitution or terms of the trust, invest the trust funds—

(*a.*) In the purchase of redeemable stock issued, under the Local Authorities Loans (Scotland) Acts, by any local authority in Scotland;

(*b.*) In loans on bonds, debentures, or mortgages secured

on any rate or tax levied under the authority of any Act of Parliament by any local authority in Scotland authorised to borrow money on such security.

The Colonial Stock Act, 1900, includes amongst trust investments any colonial stock, which is registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 and 1892, as amended by this Act (1900), subject to the restrictions contained in section 2, sub-section (2) of the Trustee Act, 1893.

Trustees are not entitled to invest the trust funds or to leave them invested in a trading company, unless authorised by the trust-deed. If, when duly authorised, they invest the trust funds in a trading company, they become partners, and are individually liable as such, either in a question with creditors of the company or in the way of relief to their copartners.

A trustee may be personally liable for investments of trust funds made by him. The common case is where he places funds in an investment not authorised by the trust-deed itself, or by statute, or where he is negligent in choosing the investment. By the Trusts Act, 1891, 54 and 55 Vict. c. 44 (which in general applies to investments made before as well as after its date), however, a trustee escapes liability when lending money on the security of any property, provided he acted upon a report as to the value of the property by a person reasonably believed to be an able practical valuator, instructed independently of the owner, and advances no more than two-thirds of the amount of such valuation. The Act further provides that —"Where a trustee shall have improperly advanced trust money on a heritable security, which would at the time of the investment have been a proper investment in all respects, for a less sum than was actually advanced thereon, the security shall be deemed an authorised investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof, with interest."

CHAPTER III.

BILLS AND PROMISSORY NOTES.

We are now to consider a class of writs which are altogether peculiar in the legal privileges which they possess. The advantage which commerce has reaped from the introduction of Bills of Exchange cannot well be estimated. From a small beginning they have grown into a vast and widespread system, upon which the trade of the world may be said to be based. Although at first inland bills were limited to mercantile transactions, they have now been extended in their application far beyond their original object, and are employed for the constitution of all kinds of debt. The bill, while simple in its form, and exempt from all solemnities of execution, is privileged, in respect that the obligation contained in it is enforced by the strictest and most summary execution known to the law.

The Bills of Exchange Act, 1882, has codified the greater portion of the common law and statutory law on this subject. It has, however, provided that the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

A bill of exchange, as defined by the Act, section 3, is "an unconditional order in writing addressed by one person" (the drawer) "to another" (the drawee), "signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer," —the payee. An instrument which does not comply with these conditions, or which orders any act to be done in addition to payment of money, is not a bill of exchange.

A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer. Promissory notes were at one time not allowed the same privileges as bills, but were subsequently put upon the same footing by the Acts 12 Geo. III. c. 72, and 22 Geo. III. c. 18. Such points of distinction as exist in regard to their treatment under the Act of 1882 will be noticed as we proceed.

Bills are divided into inland and foreign bills. That alone is an inland bill which is, or on the face of it purports to be (*a*) both drawn and payable within the British Islands (*i.e.*, Great Britain and Ireland, Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of the King); or (*b*) drawn within such area upon some person resident therein. A bill may be treated by the holder as an inland bill unless the contrary appears on the face of it.

Essentials of a Bill.—The essentials of a bill or note are (1) that it be in writing; (2) (under the Stamp Act, 1891, as to inland bills, and foreign bills in any way negotiated within the United Kingdom) that it be duly stamped; and (3) that it contain an unconditional order or promise to pay. Thus an order to pay a sum out of a particular fund will be conditional, for it depends on the existence of that fund. But if the order to pay be unqualified, it will not be held to make it conditional that the bill points out a particular fund out of which the drawee may reimburse himself, or points out a particular account to be debited with the amount, or gives a statement of the transaction which gave rise to the bill. These things are not germane to the bill, but they introduce no condition into it. (4) The bill or note must order or promise payment of a sum of money. (5) The sum must be certain in amount. (6) The drawee must be named, "or otherwise indicated in the bill with reasonable

certainty." There may be two or more drawees, but the bill must not be addressed to them alternatively or in succession; such a document would not be a bill of exchange. (7) The money must be either payable on demand, or at a fixed or determinable future time. It will be payable on demand if it bears on demand, at sight, or on presentation, or if no time of payment is expressed. It will be payable at a fixed or determinable future time, if a time is expressed, or if it be payable at a fixed period after date or sight, or at a fixed period after an event which is certain to happen, although the time of happening be uncertain.

The person to whom the payment is to be made must be the bearer, otherwise payment to the order of a specified person may be required. In the latter case the payee must either be named or otherwise indicated with reasonable certainty.

If a document contain the essentials of a bill, as above explained, in intelligible words, it is a bill, no set form of words being required by the law. From the fact of its being a bill there follow certain privileges, which are (1) the non-requirement of legal formalities in execution; (2) negotiability; and (3) summary diligence.

The Act of 1882, it should here be remarked, has deprived the holders of bills of one privilege which lawyers and bankers regarded so highly as to attribute to it much of the convenience and credit which bills possessed. There is a presumption that the sum in the bill is due to the holder, and if the debtor desires to rebut that, he will still, in the general case, have to consign the sum, or find caution such as the Court may fix. But formerly the proof that the sum was not due was limited to the writ or oath of the holder. The opinion was, however, even before 1882, expressed by Lord Mure, and concurred in by Lord President Inglis and Lord Deas, that wherever the averments of parties on record, as explained or admitted by the holder of a bill suing upon it, were such as to show that the bill came into the possession of the holder through some irregular dealing, and not in the ordinary course of business, or

were such as to lead to the inference that no actual value was given for the bill at the time, or wherever the special circumstances in which the holder became possessed of the bill, as admitted or explained by him, were such as rendered it desirable for the ends of justice that the inquiry into the facts should not be limited to the writ or oath of the holder, the Court would allow a proof, before answer, of the averments,—*Ferguson, Davidson, and Co.* v. *Jolly's Trustees*, 1880, 7 R. 500. Now parole evidence of any fact relevant to the question of liability on a bill, note, or cheque is admissible.

Such are generally the nature and privileges of bills, but it will be proper to examine in detail the various parts and the manner of negotiating and obtaining payment of bills. It is necessary in doing so to bear in mind what has been already stated with regard to the granting of deeds—that no party will be bound by a bill who labours under any legal incapacity to enter into contracts. To take a recent example, a married woman cannot make herself liable as party to a bill,—*M'Lean* v. *Angus Brothers*, 2nd Feb. 1887, 14 R. 448.

The Stamp.—While the Bills of Exchange Act, for the purposes of that Act and of the law in general, defines a "bill of exchange" (sec. 3), the Stamp Act, 1891, 54 and 55 Vict., as amended by the Finance Act, 1899 (sec. 10), regulates *the stamp duty* exigible. By section 32 of the Act of 1891, a bill of exchange for the purpose of stamp duty includes "any document in writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money." This definition includes documents which do not come under the Bills of Exchange Act.

Inland notes, and inland bills not being on demand, must be written upon paper impressed with a stamp of sufficient value. This includes bills and notes for sums not over £5. If written upon paper impressed as to duty for the proper amount, but intended for a document other than a bill or note, the paper

may be appropriately after-stamped on payment of the duty and a penalty of forty shillings, if the bill is not then due, or £10 if the bill is overdue. The stamp duty on a bill on demand or at sight may be denoted by an adhesive stamp of one penny, which must be cancelled before the bill is delivered. A bill drawn upon an impressed stamp bearing date subsequent to that which appears on the bill is apparently valid and effectual (sec. 13). Every one who "issues, indorses, transfers, negotiates, presents for payment, or pays" any bill of exchange or promissory note liable to duty, which is not duly stamped, is liable to a fine of £10. It is also to be kept in view that any material alteration made on a bill after being written out, signed, and delivered may invalidate the instrument as constituting a new bill. Where the holder of a bill, lost before it is overdue, obtains a fresh bill of the same tenor, this bill requires to be stamped (sec. 69). If a bill be written on unstamped paper, or on a stamp of insufficient value, it is invalid,—*Durie's Executrix* v. *Fielding*, 1893, 20 R. 295. As regards bills drawn or made out of the United Kingdom, every person into whose hands such bill comes in the United Kingdom before it is stamped must, before presenting for payment, indorsing, transferring, negotiating, or paying such bill, affix thereto a proper adhesive stamp or stamps of sufficient amount, and cancel the same. In a case in which an action was raised to recover the amount in a foreign promissory note which was properly stamped at the date of the action, it was held to be no good defence to aver that when the note was originally presented for payment in the United Kingdom it was unstamped, since presentation without a stamp did not involve nullity,—*Broddelius* v. *Grischotti*, 4th March 1887, 14 R. 536.

Bills or notes for less than twenty shillings are void (8 and 9 Vict. c. 38, sec. 16), and any one who negotiates or transfers the same, in Scotland, is liable to a penalty of not more than £20. Where a bill is drawn in a set and is duly stamped (see *infra*, p. 63), the others of the set, unless separately negotiated, are exempt from duty.

Consideration for a Bill.—The common law of Scotland is that valuable consideration is not required for a bill, and, therefore, that non-onerosity is not a sufficient defence. The words "for value received" are unnecessary in a bill, whether value has or has not been received for it. The common law of England, on the other hand, is that a contract as a bill, like any "simple" contract, requires consideration. The Act of 1882 provides, section 27, that valuable consideration for a bill, whether drawn at a currency or payable on demand, may be any consideration sufficient to support a simple contract or an antecedent debt or liability, such as the crediting by a banker of his customer's account with the amount of a bill or cheque (*Clydesdale Bank v. M'Lean*, 1883, 10 R. 719 (aff. 9 App. Ca. 95). This provision does not alter the rule of the common law of Scotland; but it does not follow from that rule that the defence of no value is always irrelevant. For example, a bill may be an accommodation bill—*i.e.*, a bill in which a party has signed as drawer, acceptor, or indorser without receiving value therefor, and for the purpose of lending his name to some other person. Now this party is not liable to that person, or to any holder of the bill who gave no value for it, but to a holder for value, or to one acquiring right through him, he is liable, whether his position as a mere accommodation party was known to that holder or not. Other instances in which the defence of no value will be effectual against a holder who has given no value for the bill have been thus enumerated, viz.:—(1) Where there has been no intention to grant an obligation—*e.g.*, where an acceptance has been obtained by force, fear, or fraud; (2) Where a bill has been given under an agreement that it was to be used only on a certain consideration; (3) Where a bill has been given for an immoral or illegal consideration. There is a presumption (sec. 30) that every party whose signature appears on a bill became a party for value, and where value has been once given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to value being given. A banker

has a lien on bills belonging to his customer which are in his possession. To the extent of the sum for which lies a lien he is deemed to be a holder for value.

Date of the Bill.—It does not render a bill invalid that it has no date,—Act of 1882, section 3. But it is of great importance that every bill be dated, since if without a date it loses the privilege of summary diligence. Nor does it render a bill invalid that it bears date of a Sunday, or that it is ante-dated or post-dated. If it bears a date, that date shall be presumed to be its true date till the contrary be proved (sec. 13). If a bill payable at a fixed period after date is issued undated, or if the acceptance of a bill payable at a fixed period after acceptance is undated, any holder may insert the true date of issue or acceptance, and the bill will be payable accordingly. In the case of a holder in good faith and by mistake inserting a wrong date, and in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, such date is held to be the true date, and the bill is payable accordingly. But if it be admitted or proved that a bill has been fraudulently ante-dated or post-dated, or that a wrong date has been inserted with similar intent, the holder must prove that value subsequent to the fraud has been given in good faith for the bill. The mention of the place from which the bill is issued is not essential; nor is the mention of that at which the bill is payable. If it should be necessary to prove the place of drawing or payment, parole evidence is competent to do so.

Sum in the Bill.—The amount written in words in the body of the bill regulates the value of it. It is customary, but not essential, to place the value in figures at the top. Where there is a discrepancy between the sum as given in words and that as given in figures, the amount in words is the amount payable. When there is an ambiguity in the words, the sum in figures may be used to explain it,—*Gordon* v. *Glass*, 3rd June 1848, 10

D. 1129. For instance, if in writing the sum in the body of the bill, the word "pounds" were omitted, the sum superscribed would be of material use in support of what was really meant, In England it has been held that a bill for "twenty-five seventeen shillings and threepence," omitting the word pounds, was good for £25 : 17 : 3 ; and in Scotland it was decided, in *Gordon* v. *Glass* (*supra*), that summary diligence could pass on a bill having a similar omission of the word "pounds." But where the issuer has by his negligence—as by leaving a space for the amount—allowed of a wrong sum being subsequently written in, and if this be done, he will be held liable for the sum so inserted, in a question with a holder in due course.

The sum payable must be certain, and "money" means coin. It will still be a sum certain though it be to be paid with interest, or by stated instalments, or by stated instalments with a provision that if any instalment be not paid the whole shall become due, or if it be to be paid according to a rate of exchange indicated in, or to be ascertained as directed by, the bill. When no rate of interest is specified, but the words "with interest" only appear on an inland bill, five per cent. interest is implied. If "bank interest" were specified the bill or note would not be good, since it would then be impossible to say the sum was certain, for extraneous evidence would be required in order to show the sum payable,—*Tennant* v. *Crawford*, 12th January 1878, 5 R. 437. The interest, unless the bill otherwise specify, runs from the date of the bill. If interest be not stipulated for in the bill, the rate will be at five per cent. from its due date. If the bill is undated, interest runs from the date it was issued.

Term of Payment.—The practice is to make the bill bear a term of payment—*e.g.*, "on demand," "sixty days after date," or the like. It will be recollected that by the definition of a bill it must be payable at a "fixed or determinable future time." However remote the term of payment may be, if it is certain to arrive (*e.g.*, "on the death of *A. B.*"), the bill would be sustained,

but if indefinite, such as a marriage or a succession to an inheritance, it would be a bad bill. A bill in which no time for payment is expressed is payable on demand (sec. 10), a term synonymous with the terms "at sight," and "on presentation:" such bills do not carry "days of grace." The term of payment is in that case "determinable," as it is also in the case of a bill payable at a fixed period after sight or after a specified event which is certain to happen (sec. 11). Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand (sec. 10); but this section is not intended to be taken as rendering such bill a bill payable on demand as regards the stamp duty.

Payee's Name.—(Section 7.) It has already been seen that a bill may be payable to bearer, or to the order of a specified person—*i.e.*, a person named *in the bill itself*, or indicated in it, "with reasonable certainty." An instance of indication of the payee with reasonable certainty is found in a bill payable "to my order," where the signature of the drawer supplies the certainty required. If a bill be written out with a blank for the payee's name, the person in possession of it has *primâ facie* a right to fill in a name, but if there be no blank for that purpose there would be no bill. If payable to " . . or order," the bill is valid if endorsed by the drawer, provided the blank be not filled in,—*Chamberlain* v. *Young and Another*, 1893, 2 Q.B. (C.A.) 206. Where the payee is a third party, *i.e.*, where the bill is payable neither to the drawer nor to his order, the payee's address or occupation may be added; or if he be acting in a representative capacity, such as a trustee, the fact may be appended. Two or more persons jointly may be payees of a bill. If so, it must be presented for payment by or on behalf of them all, and be indorsed by or on behalf of them all. Or a bill may be made payable alternatively to one payee or another, or one or some of several payees. A bill may also be payable to the holder of an office for the time being. But if so,

and the holder of the office be not also named in it, summary diligence could not be done upon it,—*Fraser* v. *Bannerman*, 21st June 1853, 15 D. 757.

Sometimes a bill is made payable to a fictitious or non-existing person. If this be so, the bill may be treated as payable to bearer. When the drawer and drawee are the same person, or when the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, as a bill of exchange or as a promissory note (sec. 5 (2)). A promissory note may, since the passing of the Act of 1882, be made payable to one or two or some of several payees.

Place of Payment.—It is common for convenience of parties to insert in bills a place of payment. It does not render a bill invalid if this be not done. The place of payment, however, is often of great practical importance with regard to the treatment and negotiation of a bill. The acceptance, for example, may specify a particular place at which only the acceptor engages to pay the bill, *e.g.*, "payable at Bank of Scotland, and there only." This is called a local acceptance. If the bill specifies a place of payment, or if the acceptance is a local acceptance, the bill must be presented at the place mentioned. (See under "Presentment for Payment," page 52.)

Contract and Liability of Drawer.—The bill when drawn may be delivered to the payee already accepted by the person on whom it is drawn. More commonly it is delivered unaccepted, leaving it to the payee to get it accepted. By drawing it and delivering it to a payee, the drawer engages that if it be duly presented, in terms of sections 40, 41, and 45, to the payee, it will be accepted and paid, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it. But this is subject to the condition that if it is dishonoured the steps requisite on dishonour will be duly taken (sections 48-51). What these steps are will be detailed hereafter. If he be called upon to fulfil his contract to compensate such a holder or

indorser he will have to pay him the amount of the bill with interest at five per cent. from the time when it ought to have been paid, and the expense of taking the necessary steps of noting and protesting the bill. In drawing the bill, however, the drawer may express it so as to contain words indicating an intention that it be not negotiable, in which case it is valid only between him and the acceptor and payee, and cannot be indorsed away to another; or he may negative his liability to the holder (*e.g.*, if he add the words "without recourse"); or limit his liability; or he may, on the other hand, waive some or all of the holder's duties towards himself. He may also insert the name of a person to whom the holder of the bill may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such a person is called a "referee in case of need." The holder may or may not resort to him as he thinks fit. The reference, written on the bill, usually reads, "In case of need apply to *A. B.* for *C. D.*" The name of a referee in case of need may be inserted by an indorser.

Presentment for Acceptance.—When a bill is payable after sight, it is necessary to present it for acceptance in order to fix the maturity of it. If negotiated without acceptance being obtained, the holder must either again transfer it or present it for acceptance within a reasonable time, since if this be not done the drawer and all indorsers prior to that holder will be discharged. Where a bill expressly stipulates that it shall be presented for acceptance, or where it is drawn payable elsewhere than at the place of residence or business of the drawee, it must be presented for acceptance before being presented for payment, unless the holder has not time, with the exercise of reasonable diligence, to present it for acceptance before presenting it for payment at maturity, in which case the delay is "excused" and the drawer and indorsers are not discharged. In other cases no presentment for acceptance is necessary, and the bill may simply be presented at maturity for payment. But in practice a banker holding an unaccepted bill

gets it accepted without delay; and if a banker or other agent has a bill forwarded to him with express instructions to present it for acceptance and fails to do so, he will be held liable for its contents,—*Dunlop* v. *Hamilton*, 1810, 15 F.C. 497; *Van Diemen's Land Bank* v. *Victoria Bank*, L.R. 3 P.C. 526. This is on the principle that acceptance lends greater security to the bill. Presentment, where necessary, must be made by the holder, or on his behalf, to the drawee or some person authorised to accept or refuse to accept for him, and it must be done at a reasonable hour on a business day before it is overdue. "Reasonable hours" means, in the case of a banker, bank hours; in the case of a merchant, business hours; in other cases a Court may be required to determine whether the time was reasonable. In a bill addressed to two or more payees, who are not partners, presentment must be to them all, unless one has authority to accept for all, when presentment may be to him only; but, in a bill so drawn, if no such authority exists, and acceptance be refused by even one, a holder taking such, without the express or implied consent of the other parties to the bill—viz., drawer and indorsers—has obtained a "qualified" acceptance only, and thus discharges them. The drawee has the bill left with him for twenty-four hours, according to the usual custom in this country, but the time depends on the custom of the place of presentment; this is that he may have time to say whether he will accept it or not. If not accepted within the customary time, the bill must be treated as dishonoured. Presentment, where necessary, must be made, even if the holder does not expect that the bill will be accepted; but it is excused if the drawee is dead or bankrupt (though it may be made to his personal representative or his trustee), or where, with reasonable diligence, he cannot be found, or where the bill is drawn on a fictitious or an incapacitated person.

If acceptance be refused, the bill must be treated as dishonoured. When it is so dishonoured, a right of recourse arises against the drawer and indorsers. No presentment for payment is necessary.

From its nature a promissory note is not capable of being accepted or presented for acceptance.

The effect of drawing a bill upon and presenting it to a drawee who has funds in his hands belonging to the drawer available for the payment thereof is, in Scotland, as already noticed, that the bill operates as an assignation of the sum in the bill in the holder's favour; and this assignation dates from the time when the holder presents the bill to the drawee,—Act, sec. 53, and *British Linen Co. Bank* v. *Carruthers*, 1883, 10 R. 923; *British Linen Co.* v. *Rainey's Trustee*, 1885, 12 R. 825. Bills are preferred according to the date of their presentment to the drawee. The bill is an order to pay addressed to the drawee who has the fund. If he has it when the bill is presented to him, he must thereafter hold for the payee to whom it has been assigned by the bill. If, having funds of the drawer in his hands, he refuse to accept, a protest should be taken for non-acceptance. The holder will thus have an intimated assignation of the funds in his favour, and be preferable to a subsequent arresting creditor of the drawer. The funds would be recovered not by any diligence on the bill, on which the drawee's name would not appear, but by an ordinary action against the drawee for the debt due to the drawer, founded on the bill as an assignation of the debt, and not on the bill alone. This law, which was the common law in Scotland, is preserved in Scotland by the Act of 1882. But it must be observed that the Act has not made it law outside Scotland. A bill is not in England an assignation of funds in the drawee's hands.

Acceptance.—The person on whom a bill is drawn is, before he accepts it, called the "drawee," and after he accepts, the "acceptor." By accepting a bill the acceptor engages that he will pay it according to the tenor of his acceptance, whether general or qualified (see secs. 54 and 19). The acceptance must be written, not on a separate paper, but on the bill itself. The bill may be accepted before the drawer has signed it, or while

otherwise incomplete, or when it is overdue, or after a previous refusal to accept, or even after it has been dishonoured by non-payment. The mere signature of the drawee is sufficient, but frequently the word "accepted" is prefixed. The only person who can accept is the drawee or an agent acting per procuration for him; except, *with the holder's consent*, a referee in case of need or an acceptor for honour upon protest; or in the case of a company having power to accept, a party duly authorised. If he accept the bill and deliver it accepted to the person entitled to it, or gives him notice that he has accepted it, he enters into a contract to pay it, but until delivery or notice of acceptance be given, such acceptance is incomplete and revocable. His acceptance may be "general," *i.e.*, an assent without qualification to the drawer's order, or it may be qualified,—*i.e.*, varying the effect of the bill as drawn. For example, it may be qualified by a condition on which payment is to depend. In that case it would be necessary for the holder to prove that the condition had been fulfilled, and the bill would not therefore warrant summary diligence. We have also seen that it may be "local." A local acceptance does not constitute a qualified one, unless it states that the bill is to be paid there only and not elsewhere. It may also be qualified as to time, as in a bill drawn at *three* months and "accepted payable at *four* months." Or there may be several drawees, and the qualification may consist in its being an acceptance by one or more of them, but not all. The holder may refuse to take a qualified acceptance, and treat the bill as dishonoured by non-acceptance. If he take one without the express or implied authority of the drawer and indorsers, his taking it will discharge them, although the acceptor and parties taking subsequently will be bound. The assent of those already liable will be implied from their silence beyond a reasonable time after notice to them that the qualified acceptance has been taken. The acceptance may be to pay part of the bill only, and this constitutes a qualified acceptance, but the drawer and indorsers are not freed if the holder has given them notice of his intention. If the bill be a foreign one, it is

also necessary to protest it as to the balance. A qualified acceptance, of whatever kind, ought to appear as such *ex facie* of the bill in plain terms,—*Meyer* v. *Decroix Verley et Cie.*, 1891, A.C. 520.

Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as *prima facie* authority to fill it up for any sum the stamp will cover, using the signature as that of the drawer, acceptor, or indorser. This must, however, be done within a reasonable time, and strictly in accordance with the authority given, otherwise it is not enforceable against any person who signed the bill before completion. A "holder in due course" does not require to show that it was so filled up, and may enforce it according to its tenor. In like manner, a person in possession of a bill which is wanting in any material particular has, *prima facie*, authority to fill it up in any way he thinks fit. (See case of *Russell* v. *Banknock Coal Company*, 1897, 24 R. 1009, on these points.)

An acceptance does not require to be dated, the date of the bill being held to be the date of the acceptance. When, however, the bill is payable so many days after sight, or at some other currency running from the date of the acceptance, the date of acceptance fixes the date at which it is payable, and the acceptor should date it. If he does not, the holder may insert the true date. A bill accepted at a banker's is a constructive authority by the acceptor to the banker to pay the bill on his account. In the *British Linen Co.* v. *Rainey's Trustees*, 1885, 12 R. 825, previously quoted, it was held that a bill accepted "payable at" a banker's on presentment operated as an intimated assignation of the funds of the acceptor in the banker's hands. A drawee is bound to accept a bill drawn upon him if he has expressly or impliedly undertaken to do so.

Acceptance for Honour.—Where a bill has been dishonoured by non-acceptance, a third person may accept the bill for the honour of any party liable thereon, so as to prevent that party's

credit from being injured, but if it do not expressly state for whose honour it is done, it is deemed to be for the honour of the drawer. It can take place only when a bill has been protested for dishonour by non-acceptance, or protested for better security and is not overdue, and the consent of the holder is required to the intervention. It must be written on the bill itself, and indicate that it is an acceptance for honour, and the acceptor for honour must sign it. A "referee in case of need" may so accept, since, although his name appears on the bill, he is not *liable* on it. The acceptor for honour engages by so doing to pay the bill if the drawee does not do so, provided that it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts. He is liable to the holder and all parties subsequent to the party for whose honour he accepts. Presentment must be made to the acceptor for honour not later than the day following its maturity, unless where his address is elsewhere than the place of protest, when the bill must be forwarded for presentment to him not later than the day after its maturity. Delay in presentment or non-presentment is excused under such circumstances as under the Act (sec. 46) excuse delay or non-presentment for payment. When a bill of exchange is dishonoured by the acceptor for honour, it must be protested for non-payment by him in order to preserve recourse.

Payment for Honour.—Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest, *without* the consent of the holder, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. If the holder refuses such payment he thereby loses his rights against any party whom such payment would have discharged. The payment for honour, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour, founded on a declaration made by the payer of his intention to pay the bill for honour, and for whose honour he pays it. Where two or more persons

offer to pay a bill for honour, the person whose payment will discharge most parties to the bill has the preference. All parties subsequent to the party for whose honour it is paid are by such payment discharged, but the payer for honour is subrogated for and succeeds to the rights and duties of the holder as regards the party for whose honour he pays and all parties liable to him. On payment, the payer for honour is entitled to the bill and the protest. His position is that of an assignee of the holder, and not that of a holder, so that he takes the bill subject to all exceptions pleadable against the holder.

Subscription of the Parties.—It has been mentioned that the drawer and acceptor must sign the bill or acceptance. A signature in a trade or assumed name is equivalent to the party's own name. The signature need not be written with his own hand, but it is sufficient if it be written by some other person acting by or under his authority. Such authority may be proved by parole, but a bill so signed will not warrant summary diligence, at least where the procuration is not well known. When the party cannot write, subscription by a notary or a Justice of the Peace in presence of two witnesses, in terms of the Conveyancing Act, 1874, will be sufficient to entitle the bill to all its privileges. The signature may be by mark, or by initials, if that be proved to be the party's customary method of signing, but summary diligence cannot be done on a bill so drawn or accepted. A corporation may sign by sealing with the corporate seal, or it may give authority to certain officials to sign for it. As to companies incorporated under the Companies Acts, a bill or note is deemed to have been made, accepted, or indorsed on behalf of such company, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf of, or on account of, the company by any person acting under the authority of the company. In the case of private partnerships the firm's name is signed by a partner.

What has just been said as to the mode of signature of or for

corporations, and companies under the Companies Acts, assumes that there is capacity to enter into the contract involved in becoming a party to a bill. No party is liable on a bill who has not signed it in one or other of the following capacities, viz.—(1) as drawer, (2) as indorser, or (3) as acceptor; and no one legally incapable of contracting can be held liable on a bill; but where an infant, minor, or corporation, not having authority or power to incur liability on a bill, nevertheless draws or indorses a bill, the holder may enforce payment against any other party liable on it. Mercantile corporations incorporated by royal charter have power to become parties to bills. Non-mercantile corporations have not, unless expressly authorised by their charter. Companies incorporated by special Act of Parliament have only the powers contained in their Act, unless their business necessarily implies becoming parties to bills. Companies under the Companies Acts may only become parties to bills when such is authorised by their memorandum or articles of association, or where their business necessarily implies the granting of bills. A partner has only power to bind the firm and his copartners for what is in the line of the business of the firm. Where, therefore, the granting of bills is outwith the business of the firm, and there is no authority by the other partners to grant them, no one partner is entitled to subscribe the firm's name to bills to the effect of binding the firm or his copartners,—*Paterson Brothers* v. *Gladstone*, 1891, 18 R. 403.

We have seen that a bill may be accepted by an agent acting per procuration. Signatures per procuration to bills are common in practice, and effectually bind the principal if the agent in so signing was within the limits of his authority. That authority may be by written mandate or verbal mandate, or it may be inferred from a course of conduct showing that the agent was empowered to act. In order to subject the principal to liability, the signature of the agent must be as procurator for the principal, and from the nature of the signature the other party has notice that the authority is limited, and is

bound to satisfy himself as to its authenticity and sufficiency. But where a person dealing with the agent inquires as to his authority, and finds that the act is in itself warranted by the terms used, although the agent abuse his authority and embezzle the money he received by his act, the constituent will be liable to a *bona fide* holder for value,—*Bryant and Others* v. *La Banque du Peuple*, 1893, App. Ca. 170. If the signature be the agent's own name only, the principal will not be liable. Where a person signs, adding words indicating that he is signing for a principal or in a representative character, he is not personally liable, but the mere addition of words describing him as an agent or as filling a representative character does not exempt him from personal liability. For example, if the directors of a company were to sign a bill or note designing themselves as "A. B. and C. directors of the X. Co.," they would be personally liable (as would executors adding to their signature merely the words "Executors of ——"). But if directors sign "for behoof of the X. Co.," provided always the company has power to become a party to a bill, they would not be personally liable. See *Brown* v. *Sutherland*, 17th March 1875, 2 R. 615; *Alexander* v. *Siger*, L.R. 4 Ex. 102; and the Bills of Exchange Act, 1882, sec. 26; and *MacMeekin* v. *Easton*, 1889, 16 R. 363. In this last case, A. B. and C., who signed a promissory note in these terms—"We, the undersigned, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay," were held personally liable for payment of the note. The whole of the obligants on a bill are liable conjunctly and severally, though the bill does not contain these words.

Indorsation.—We have seen that where the bill is not payable to bearer the indorsation of the payee or holder is necessary to negotiation or transference as well as the delivery of the bill. If the latter requisite alone had taken place the bill would not be negotiated. But the transferee would obtain the right to have the transferor's indorsement, and, meantime, the right which his transferor had in the bill.

Every indorser is liable to the holder conjointly and severally with the drawer and acceptor, except where the bill is indorsed "without recourse," in which case the indorser places himself in the position of a "transferor by delivery;" and where the last indorser is called upon to pay, he may go back upon the previous indorsers and the drawer, as well as upon the acceptor.

An indorsement must, in order to negotiation, be written on the bill, but not necessarily on the back thereof, although it usually is so, or it may be written on an allonge—*i.e.*, a slip of paper attached to a bill, where there is no room on it for further indorsations. In some countries, but not in the United Kingdom, "copies" of a bill are recognised. If a bill is issued or negotiated in one of these countries, an indorsement may be on a "copy." When made payable to the person named, or to the drawer or his order, the bill is transmitted by the simple indorsation of the payee or drawer. That is called a blank indorsation. It makes the bill payable to the bearer, and were the holder of such a bill to discount without his having indorsed it, and the bill be dishonoured by non-payment, he would not be bound to refund. It may, however, be special, denominating the party to whom it is indorsed, thus—"Pay to A. B. or order," *or* "Pay to A. B.'s order," *or* simply, "Pay to A. B." The special indorsee must be denominated with reasonable certainty. A bill thus indorsed cannot again be transmitted without the signature of the special indorsee. A holder, however, of a bill with a blank indorsement, followed by special indorsements, may cancel the special indorsements, and thus make the bill payable to bearer. If the payee or indorsee be wrongly designated, or his name be misspelt, in a bill payable to his order, he may indorse in similar terms, and thereafter, if he desires, add his usual signature. With reference to special indorsation it ought to be kept in view that the indorsee must be named in order to warrant summary diligence. An indorsation thus, "Pay to the Agent of the Bank of Scotland, Glasgow," would not be sufficient to warrant summary diligence at his instance. The agent's name would require to be inserted,—*Fraser* v.

Bannerman, 21st June 1853, 15 D. 756. A person having a procuration may have the power of indorsing as well as of accepting or drawing a bill, but his authority may be to draw only, and unless it may be inferred from previous dealings, duly confirmed, it must not be taken for granted that his authority extends to the others. Other authorised agents may also indorse, and so may a trustee in bankruptcy, or an executor.

An indorsement may be "restrictive." By this form of indorsement the indorser gives the indorsee power to receive payment of the bill, and, if necessary, to sue any person he would himself have sued for payment of it, but, at the same time, expresses his intention, either (1) that the indorsee shall not negotiate the bill to any one else, or (2) that the indorsee is not to become owner of it at all, but only to have authority to deal with it as he, the indorser, directs,—*National Bank* v. *Silke*, 1891, 1 Q.B. 435. Examples of the latter, and of restrictive negotiation, are, "Pay D. only," or "Pay D. for account of X.," or "Pay D. or order for collection." If a bill has been restrictively indorsed, the indorsee has no power to transfer his rights unless the indorsement expressly authorises him to do so, in which case he gives no better title than he has himself.

An indorsement cannot be partial—*i.e.*, of part of the bill. It must operate upon the bill and all that is due under it, the whole if it is wholly unpaid, or the whole balance if there has been a partial payment. It may be conditional, and as such available against the party who takes it. But the payer of the bill need not pay any attention to the condition, and his payment to the indorsee will be valid whether the condition has been fulfilled or not. Where the holder of a bill payable to his order transfers it for value without indorsation, the transferee acquires such title as the transferor had, and also the right to have the transferor's indorsement. It has been held that the delivery of a bill to a person for value without indorsation, is equivalent to an intimated assignation of the sum in the bill, and that the transferee, having given value,

is entitled to recover payment from the acceptor,—*Hood* v. *Stewart*, 1890, 17 R. 749. A bill, negotiable in its origin, continues negotiable until it has been discharged by payment or otherwise, or until it has been restrictively indorsed. Thus a bill which is overdue continues to be negotiable, but subject to this important condition, that if it is negotiated after it is overdue, the person who takes it will be subject to any defect of title which affected it at maturity. After maturity no one can acquire or give a better title than that which the person from whom he took it had. *Prima facie*, every indorsement which is not dated after the maturity of the bill is taken to have been effected before it became due. A bill payable on demand is deemed to be overdue when it appears, on the face of it, to have been in circulation for an unreasonable length of time. Indorsements are deemed, until the contrary be proven, to have been made according to the order in which these appear on the bill.

If an indorser wishes to free himself from further liability at the instance of the indorsee, he may do so by adding under his signature the words "without recourse." Sometimes a bill is negotiated back to the drawer himself, or to a prior indorser, or to the acceptor. Any such person may re-issue and further negotiate it, and his indorsee will have a right of recourse against previous indorsers, but he is not entitled to enforce payment of it against any party to whom he was previously liable intervening between his former indorsement and his new indorsement. If, however, a bill which is due has been negotiated to the holder in his own right it is discharged, and cannot be re-issued. See "Discharge of Bill," page 61, *infra*.

Transmission of Bills.—Until delivery of a bill, which means "transfer of possession, actual or constructive, from one person to another" (sec. 2), every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable (sec. 21), but a holder in due course has a conclusive presumption that all prior parties have delivered the

bill. A bill payable to bearer may be passed from hand to hand like a bank note. A bill payable to order requires indorsation as well as delivery. A bill is negotiated (see Bills of Exchange Act, 1882, sec. 31) when it is transferred from one person to another in such a manner as to constitute the transferee the "holder" of the bill, that is, the payee or indorsee who is in possession of the bill. The party thus acquiring right to the bill may again transmit it to another, and the bill may be thus transmitted till a protest is recorded, after which a formal assignation of the bill is required, and diligence. The engagements of the indorser, as in the case of the drawer of a bill, are conditional on due presentment thereof, and on the necessary steps being taken on dishonour. (Sections 40, 41, 45, and 48-51 may be referred to for rules as to presentment, and for requisite steps on dishonour.) The negotiable nature of the document renders the law jealous of the security of the person who becomes what is called the "holder in due course." A holder in due course is a holder who has taken a bill, complete and regular on the face of it, before it is overdue, without notice of previous dishonour, if any, in good faith, for value, and having no notice at the time of any defect in the title of the person who negotiated it to him. There is a defect in a person's title within the meaning of the section, when he has obtained the bill or the acceptance of it by fraud, duress, or force and fear, or other unlawful means—*e.g.*, theft—or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. The distinction between a person having a defective title and one having no title must be observed. The person from whom the holder in due course obtains a bill may have had a *defect* in his title on the above grounds, but it will be seen that this does not affect the holder in due course unless he knows of it. He is not affected by mere personal defences available to prior parties among themselves. The acceptor cannot deny in a question with him the existence of the drawer or the genuineness of the drawer's signature, or his capacity and authority to draw the

bill; nor can the drawer deny in a question with him the existence of the payee or his capacity to indorse the bill; nor can the indorser deny in a question with him the genuineness of the signature of the indorser and of prior indorsements. When a person signs a bill otherwise than as a drawer or acceptor, he incurs the liabilities of an indorser to a holder in due course. We shall also see that while if a bill has been materially altered it is as a general rule rendered null, if the alteration be not apparent, the holder in due course may treat the bill as a good bill and enforce payment of it, according to its original tenor.

Forgery.—Where a signature on a bill is a forgery, or where it is unauthorised by the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to the bill can be obtained through it, unless the party whose signature is forged or unauthorised, and who is sought to be made liable, is barred from maintaining that his signature was forged or unauthorised. Under section 45 of the Act, an acceptor in an action on the bill is debarred from pleading by way of defence, want of authority, or forgery of the drawer's signature. The questions concerning forgery which have arisen in questions with banks have almost always turned on the point whether the party alleging forgery had adopted the bill as his. These questions turn mainly on the circumstances of the particular case. The question whether a person has adopted a forged signature is one of fact; but adoption may be inferred as a legal inference from certain facts. It may be said generally that before a person can be held to have adopted a forged signature he must have known of the forgery, been informed that he was to be held liable upon it, and have so conducted himself as to imply that he acknowledged the liability, or as to allow the other party to be prejudiced. His mere silence on coming to know of the forgery, even though it gives the other party ground for supposing that he acknowledged liability, will not infer adoption, nor will it bar him from repudiating liability unless it has resulted in prejudice to the other party. A recent

decision of the House of Lords, *M'Kenzie* v. *British Linen Bank*, 11th February 1881, 8 R. (H.L.) 8, may be referred to in illustration. John Fraser drew out a bill which he signed as acceptor, and on which he forged the names of Duncan M'Kenzie and another person as drawers. The bill was to come due on 17th July; on 14th July, M'Kenzie received written notice from the British Linen Co. that the bill would be due on 17th July, and lay at their office. He became aware then that the signature was a forgery, and that it had been forged by Fraser, who had previously forged his name to another bill. On the 18th July he was informed by the bank that the bill had been dishonoured and protested for non-payment, and on 21st July the bank again wrote to him about it. It was not till the 29th July, after intimation that proceedings would be taken against him by the bank to recover payment, that he informed the bank of the forgery. No prejudice, however, had occurred to the bank in consequence of his silence from 14th to 29th July. The House of Lords held that the bank had not proved that he had adopted the bill, and further, that he was not barred by his mere silence after knowledge of the forgery from repudiating liability. It would have been different, however, if M'Kenzie's silence had deprived the bank of some other opportunity of recovering the sum due on the bill. For example, where the person who alleged forgery remained silent for a considerable time after getting a charge upon the bill, and made no mention of the alleged forgery till the person accused of being the forger had absconded, and it was impossible to do diligence against him, the Court held that the person so acting made himself liable on the bill.

The Act provides, section 60, that when a bill payable to order on demand, *i.e.*, a cheque, is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed

to have paid the bill in due course, although such indorsement has been forged or made without authority,—*Meiklam* v. *Walker*, 1833, 13 Shaw, 53; and *Findlay* v. *Currie*, 1850, 13 D. 278.

Time for Payment and Days of Grace.—When a bill is not payable on demand, the day on which it is payable is determined thus: three days, called days of grace, are (unless the bill otherwise provides) added to the term of payment as fixed by the bill (sec. 14). The bill is due and payable on the last of these three days. If the last of the three days is a Sunday, or Christmas Day, or Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is due and payable on the preceding business day. When the last day of grace is a bank holiday (other than Christmas day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday, and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day. The due date of a bill is determined according to the law of the place where it is payable (Act of 1882, sec. 72 (5)).

Bank holidays in Scotland are—

New Year's Day. } If either of these days falls on a Sunday,
Christmas Day. } then the next following Monday.
Good Friday.
The first Monday of May.
The first Monday of August.

Bank holidays in England and Ireland are—

Easter Monday.
The Monday in Whitsun week.
The first Monday in August.
The 26th December, or if the 26th December falls on a Sunday, then the Monday following; non-business days are Sunday, Good Friday, and Christmas Day.

The term "month" means calendar month (sec. 14). A bill drawn at one month after date from 31st January is payable on the expiry of the days of grace running from the 28th, or

in leap year from the 29th February. Weeks are reckoned by the number of days, excluding the day on which the bill is dated.

When a bill is payable at a fixed period after date or after sight, or after the happening of a specified event, the time *of payment* is determined by excluding the day from which the time of payment is to begin to run, and by including the day of payment. Where a bill is payable at a fixed period after sight, the time *begins* to run from the date of acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance or for not delivering it back accepted at the end of the customary time. While a bill is due and payable "on the last day of grace," no action may be taken on it on that day. The right of notice of dishonour, however, accrues when payment is refused,—*Kennedy* v. *Thomas*, 1894, 2 Q.B. 759.

Presentment for Payment.—When the last day of grace has arrived, the bill must be presented for payment. If this be not done the drawer and indorsers are discharged. It must be done by the holder, or some one authorised to receive payment on his behalf, at a reasonable hour on a business day, at the proper place, and to the payer, as designated by the bill, or some person authorised to pay or refuse to pay on his behalf. What "reasonable hours" and "business days" are, has been seen (*supra*, pp. 37 and 51). The "proper place" is the place specified as the place of payment. If no place is specified in the bill, the acceptor's address as there given is the proper place. If no address is given in the bill, then it is to be presented at his place of business if known, or, if not, his ordinary residence. In any other case, the place, wherever it is, where the acceptor can be found, or his last known place of business or residence, is the proper place. It may be presented through the post-office, where that course is authorised by agreement or usage, and if delay, attributable to the post-office, occurs it is thought that the holder does not thereby lose any right of recourse he

may have against prior parties. Where a bill is presented at the proper place, and, after the exercise of reasonable diligence, no one authorised to pay or refuse payment can be found there, no further presentment to the acceptor is required. If there are two acceptors who are not partners, and no place of payment is specified, presentment must be made to each of them. Where the acceptor is dead and no place of payment is specified, presentment must be made to his personal representative, if such can be found. Presentment to a bankrupt acceptor is necessary; and in the case of a company in course of winding up at maturity of acceptance, presentment must be to the liquidator. In order to render an acceptor *under a general acceptance* liable, presentment to him is unnecessary, since at common law a debtor is bound to seek out his creditor and pay him. There are certain exceptions to the rule requiring presentment for payment. They are—where the bill has been dishonoured by non-acceptance; where presentment cannot after the exercise of reasonable diligence be effected; where presentment has been waived expressly or by implication; where the drawee is a fictitious person. There is also an exception in a question with the drawer where the drawee or acceptor is not bound as between himself and the drawer to pay the bill, and the drawer has no reason to believe that it would be paid if presented; and a further exception in the case of an indorser if the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented (secs. 45 and 46). In the recent case of *The Bank of Scotland* v. *Lamont and Co.*, 1889, 16 R. 769, it was held that presentment was not necessary, seeing that the drawer had entered into an agreement for the winding up of the acceptors' estates, and the acceptors were not, therefore, bound to pay the bill, and that the drawer had no reason to believe that it would be paid if presented, the acceptors being bound only to make payment rateably among the creditors of the funds in hand. See as to promissory note the case of *Gordon* v. *Kerr*, 1898, 25 R. 570.

Dishonour by Non-Payment.—When a bill is duly presented for payment, and payment is refused or cannot be obtained, or when presentment is excused, and the bill is overdue and unpaid, it falls to be treated as dishonoured by non-payment, and an immediate right of recourse accrues to the holder against the drawer and indorsers (sec. 47). There are several exceptions to such right of recourse by the holder. For instance, he has no right of recourse against a party who has not capacity to contract, or in the case of a bill which has been materially altered, or against any person who would be discharged by a payment *supra* protest, where he has refused to receive such payment; neither does his right of recourse extend to a person who has indorsed "without recourse."

Notice of Dishonour.—Where a bill has been dishonoured by non-acceptance or non-payment, notice of dishonour falls to be given to the drawer and to each indorser, and the effect of failure to give such notice to the drawer or to any indorser is to discharge him from liability. Where, however, a bill is dishonoured by non-acceptance, and notice of dishonour has not been given, the rights of a holder in due course, subsequent to the omission, are not prejudiced by the omission, and when notice that a bill has been dishonoured by non-acceptance has been duly given, it is unnecessary to give notice of subsequent dishonour, unless the bill has meantime been accepted. The rules which regulate the notice of dishonour of bills are now contained in section 49 of the Act of 1882, and notice of dishonour must, in order to be effectual, be given in accordance with them. It will be proper, therefore, here to quote that section. In the first place, however, it is to be observed that it is to the drawer and indorsers that notice must be given, in order to make these persons liable. Notice of dishonour is not necessary to make liable the acceptor, the primary obligant on the bill.

Section 49 provides—

(1.) The notice must be given by or on behalf of the holder, or

by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2.) Notice of dishonour may be given by an agent, either in his own name, or in the name of any party entitled to give notice, whether that party be his principal or not.

(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4.) Where notice is given by or on behalf of an indorser entitled to give notice as herein-before provided [*i.e.* an indorser who is himself liable at the time of giving notice,—see (1)], it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12.) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(*a.*) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(*b.*) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter. (Non-business days are excluded (see page 51.) If, then, a bill is dishonoured on a Saturday, and the parties reside in the same place, the notice must be sent so as to be delivered on or before the Monday following. If the parties reside in different places, the notice is to be posted before the last post on the Monday.)

(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post-office. (It will be observed that the sender of notice must be able to show that the letter was properly addressed as well as posted. If the address was incorrect or insufficient, he will have to prove that the notice was in point of fact delivered. Where the drawer has dated his bill generally—*e.g.*, "Glasgow" or "Edinburgh," and no other full address is known, it would be sufficient to give that address.) Delay in giving notice of dishonour is excused (sec. 50) where it is caused by circumstances beyond the control of the person giving it, and not imputable to his fault. For example, his severe illness would be an excuse. But he is bound to give the notice with reasonable diligence as soon as the cause of delay ceases to operate.

A person entitled to notice may waive his right expressly or by implication, or the person whose duty it is to send it may be unable, after using all reasonable diligence, to find him. In these cases also notice of dishonour is dispensed with (sec. 50). It has been seen that the drawer is entitled to notice. Certain exceptions to this rule are, however, admitted (sec. 50 of the Act). The most important of these is the case in which the drawee was not bound as between him and the drawer to accept or pay the bill. In like manner the same section makes certain exceptions to the rule that the indorser is entitled to notice. The most important of these is where the bill was one accepted or made for his accommodation.

A party who has guaranteed payment of a bill is not entitled to notice of dishonour—see the case of *Kirkland* v. *Brown*, 1861, 23 D. 363,—but in practice such notice is always given.

Protest.—Protest on an inland bill is not necessary in order to preserve recourse; but where summary diligence is to be done a protest is essential in every case. A protest is absolutely necessary to preserve recourse on foreign bills, that is, bills appearing on the face of them to be foreign. If such a bill be dishonoured for non-acceptance it must be protested, and if it be dishonoured for non-payment, not having been previously dishonoured by non-acceptance, it must be protested for non-payment. A foreign bill payable *on demand* need not be protested in order to preserve recourse unless it has been in circulation an unreasonable time, and no demand for payment has been made. Protest is, however, essential in the case of a foreign or inland bill—(1) before it is accepted for honour, or (thereafter) dishonoured for non-payment by the drawee, or dishonoured for non-payment by an acceptor "for honour;" (2) before presentment for payment to a referee in case of need; (3) where in a bill drawn at a fixed period after sight acceptance has not been obtained. On the dishonour of an inland bill the general practice is merely to have it noted, which is done by the notary marking the date and his

initials upon it, from which the protest may afterwards be compiled when required. By the Act of 1882, where a bill or note is required to be protested within a specified time, it is sufficient that the bill has been noted for protest before the expiration of the time, and the formal protest may be extended thereafter as under the date of the noting. It is important, however, to remember that in order to summary diligence the protest must be recorded within six months from the date of the bill falling due, otherwise this privilege is lost, and an ordinary action before the Court must be resorted to for recovery of the debt. A bill which has been protested for non-acceptance may also be protested for non-payment. If it is intended to note and protest a bill, it is to be observed that the noting must be on the day of its dishonour. The protest, when subsequently extended, is of the date of the noting, that is, of the dishonour. As the law, however, relating to summary diligence is not affected by the Bills of Exchange Act, 1882, it appears that a bill may still be protested against the acceptor in order to warrant summary diligence at any time within six months of its falling due.—(See sec. 98.) Where an error has been made in the date of noting, though the date be corrected in the extended protest, such protest will not warrant summary diligence,—*M'Pherson* v. *Wright*, 1885, 12 R. 942. As to the place of protest, it is now fixed (Act of 1882, sec. 51) that the place of protest (which, as we shall see immediately, must be mentioned therein) is to be the place of dishonour, subject only to these exceptions, viz.—*first*, that where a bill is presented through the post and returned by post dishonoured, it must be protested at the place to which it is returned (on the same day, or if not received in business hours, then the next business day); and, *second*, that where a bill is drawn payable elsewhere than at the payee's place of business or residence, and it has been dishonoured by non-acceptance, it must be protested for non-payment at the place at which it is payable, and no further presentment for payment to, or demand on, the drawee is necessary.

The contents of a protest are these (see Act of 1882, sec. 51):

—It must contain a copy of the bill (with the indorsations, if any), and must be signed by the notary who makes it, and must specify the person at whose request the bill is protested, the place of protest, the date of protest, the cause of protest, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found. The bill does not require to be presented by the notary himself. The presentment may be made by his clerk. The instrument bears that the protest was taken before two witnesses, and despite the common practice the witnesses should be cognisant of the act of protest. Where a bill is payable at the creditor's own office, if payment be not there made on the day of maturity, the protest should bear that the acceptor or drawee could not be found at the place of payment, and a protest was accordingly held invalid, which bore that a clerk stated that no funds had been provided to meet the bill,—*Bartsch* v. *Poole*, 1895, 23 R. 328. A notary cannot protest a bill in which he himself has an interest, but relationship to the creditor is no objection. On the protest being recorded, an extract is issued containing a warrant to charge the parties on the bill to make payment within six days. If the six days elapse without payment being made, poinding may follow. It is no longer competent to imprison on account of non-payment of a bill. If the bill is paid by any of the indorsers after the protest is written out at the instance of another party, diligence will be issued in such indorser's name on the holder giving him a receipt on the protest, bearing that the bill has been paid by him. The receipt must be signed by the holder or a party duly authorised by him, and the party signing must, as before mentioned, state his connection with the holder,—*Summers*, 1843, 6 D. 286. After a protest has been recorded, the diligence can only be transmitted by assignation, and no new protest can be recorded so long as the first remains recorded,—*Service* v. *Youngman*, 1867, 6 Macph. 172. The expenses of the diligence can only be recovered by an ordinary action, and the creditor is bound to give up the bill on receiving payment of the principal and interest, but he is entitled to

retain the diligence to enable him to recover the expenses of an ordinary suit.

The loss or destruction of a bill, or its being wrongly detained from the person entitled to hold it, does not render it impossible for him to obtain a protest upon it. A protest may, in such a case, be made by the notary on a copy, or on written particulars as to the bill.

Protest is dispensed with by any circumstances which would dispense with notice of dishonour, and delay in noting or protesting, caused by circumstances beyond the control of the holder, and not imputable to his fault, misconduct, or negligence, is excused. He must, however, proceed with reasonable diligence to note and protest the bill whenever the cause of delay is removed.

We have seen that the proper place at which to note and protest a bill is the place of dishonour. It may be, however, that the services of a notary cannot there be procured. The Act of 1882, section 94, provides for such a case by enacting that in the event of such a case any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate signed by them, attesting the dishonour of the bill. This certificate is to "operate in all respects as if it were a formal protest of the bill." It is doubtful, however, whether such a certificate would form a warrant for summary diligence. The Act gives a form for these certificates, which will be found in the Appendix.

Summary Diligence.—The holder of an accepted bill, which has been duly protested for non-payment, and of which due notice of dishonour has been given to the drawer and indorsers, may use summary diligence against any party liable thereon, except as against an indorser who has indorsed "without recourse." In the case of an unaccepted bill duly protested for non-acceptance, the dishonour of which has been duly notified to the drawer and indorsers, the holder may use summary diligence against the parties thereto, or any of them. Summary

diligence extends also to promissory notes duly negotiated, and it may be used against the granters thereof, or the whole indorsers, jointly and severally.

Summary diligence is competent only on bills *ex facie* complete and regular, which do not require extrinsic evidence to set up an absolute title in the holder, and on which the protest has been registered within six months. Thus the diligence will not pass on an undated bill, or on a bill signed by mark or initials, or on one accepted conditionally.

The warrant for summary diligence, which is an extract of the registered protest, charges the party against whom it is issued to pay the sum in the bill with interest from its maturity, within six days if he resides in Scotland, or within fourteen days if resident in Orkney or Shetland.

If an ordinary action on a bill is in dependence, summary diligence is incompetent.

Discharge of Bill.—A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. A bill is not discharged when paid by the drawer or indorser, but where a bill payable to or to the order of a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill; and where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill. An accommodation bill is not paid in due course until it is paid by the party accommodated. When the acceptor of a bill is or becomes the holder of it, at or after its maturity, in his own right, the bill is discharged. A bill is also discharged when the holder, at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor. Such renunciation must be in writing, unless the bill is delivered up to the acceptor. If, while renouncing his rights as regards the

acceptor, the holder reserves his rights against the other parties, the bill is not discharged,—*Crawford* v. *Muir*, 1873, 1 R. 91; aff. 1875, 2 R. (H.L.) 148. In like manner the liabilities of any party to a bill may be renounced by the holder before, at, or after its maturity, but this will not affect the rights of a holder in due course without notice of the renunciation. Apart from the Act, a bill may be discharged (1) by novation, (2) by delegation, (3) by compensation. (See Chapter XII.)

Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged. In the same way any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent; in such case any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative, but the burden of proof lies on the party alleging the want of intention, mistake, or want of authority.—See *Dominion Bank* v. *Anderson and Co.*, 1888, 15 R. 408; and *Dominion Bank* v. *Bank of Scotland*, 1889, 16 R. 1081; 1891, 18 R. (H.L.) 21.

Payments to account of a bill are usually noted on the back thereof, and should be initialed by the receiver. Where any such payment amounts to two pounds and upwards, it is liable (under the Finance Act of 1895) to stamp duty of one penny.

Where a bill or acceptance is materially altered without the assent of all parties, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers, provided that where the alteration is not apparent and the bill is in the hands of a holder in due course, he may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. The following alterations are specified by the Act as material:—Any alteration of the date, the sum payable, the time of payment, the place of payment, and, where

a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. An obvious correction is not a "material" alteration, neither does the addition of words amount to such, provided the effect of the bill, as issued, be not altered thereby.

Bill in a Set.—Foreign bills frequently consist of several parts or copies, in all composing what is called a "set," in order that although one should be lost the holder may recover payment on another part. Where each part of the set is numbered and contains a reference to the other parts, the whole of the parts constitute one bill. Only one of the parts need be stamped. A promissory note cannot be drawn in a set. A holder who indorses two or more parts to different persons is liable on each, and subsequent indorsers are liable on the part they indorse, as if the parts were separate bills. The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill; but, as between such holders, that one whose title first accrues is deemed to be the true owner of the bill. The acceptor on paying should require the part bearing his acceptance to be delivered up to him, for if that part is at maturity outstanding in the hands of a holder in due course, he is liable to such holder. Subject to what has already been said, where any one part of a bill drawn in a set is discharged, the whole bill is discharged.

Prescription of the Bill.—By the Act 12 Geo. III. c. 72, section 37, bills and promissory notes[1] are declared to be of no force or effect to produce any diligence thereon, unless such diligence shall be raised and executed, or an action commenced, within the space of six years from the date at which the bills become exigible. After the expiry of such period, neither the

[1] Bank notes are excepted,—Act 12 Geo. III. c. 72, sec. 29.

debtor nor the creditor can do anything which will give the bill force or effect as a ground of action; it ceases to exist as a document of debt, yet it is available as an adminicle of evidence,—*Campbell's Trustees* v. *Hudson's Executor*, 1895, 22 R. 943. In bills and notes payable on demand the debt is exigible on the date the bill bears; if payable at sight, or on presentation, on the date of the bill, at least if that be the date of issue; if payable at a definite period after demand or notice, on the expiry of that period; and in bills and notes payable at a fixed term, on the last day of grace. In the case of *Boddelius* v. *Grischotte*, 1887, 14 R. 536, it was held that prescription of a promissory note drawn payable "three months after notice" did not begin to run till the expiry of three months from the demand for payment. The years of minority of the creditor are not reckoned in computing the prescriptive period. Prescription may be interrupted in various other ways; for example, by production of the bill in a trust-deed arrangement, provided the bill be specially mentioned and recognised as a debt in the trust-deed, or in a schedule referred to therein. If, however, the bill is not specially mentioned in the trust-deed, the plea of prescription will not be elided (see *Bank of Scotland* v. *Taylor's Trustees*, 1859, 21 D. 1004). Prescription may also be interrupted by production of the bill in a judicial competition, such as a multiplepoinding, or a ranking and sale. In the case of *Blake* v. *Douglas*, 1860, 23 D. 15, an assignation in security was held to be evidence of the subsistence of a debt, even though the bills granted in respect of it had prescribed, on the ground that the assignation was in security of the debt, and not of the bill. Whether "interruption" entitles the holder of a bill to complete action or diligence already begun, or to raise fresh action after the sexennium, there appears to be doubt. See, however, opinions of Lords Rutherfurd Clark and Young in the case of *Milne's Trustees* v. *Ormiston's Trustees*, 1893, 20 R. 523.

Though the bill is extinguished as a document of debt by prescription, yet the debt represented by it is not so, provided

the constitution and resting-owing of the debt can be proved by the *writ* or *oath* of the debtor. But the creditor is limited to these two modes of proof. With regard to the writ of the debtor, the rules are, that it must be the writ of the debtor himself (either actually or constructively); that the writing must identify the bill; and that its date must be subsequent to the lapse of the years of prescription, unless it be a writ constituting the debt independently of the bill. A marking on the back of the bill of a payment of interest, or of a sum to account of principal, made in the debtor's own handwriting, after the years of prescription have expired, will suffice to prevent prescription, or a letter acknowledging the debt. As to the identity of the particular bill or debt, see the case of *Taylor's Trustees*, cited above, where it was held that a letter by the debtor, acknowledging that he was due to a bank bills to the amount of £3000, was not sufficient to prevent prescription of three of the bills included in that amount.

As to the oath of the debtor, if he admits the constitution of the debt, or that it was incurred by him, and says he does not remember whether it was paid or not, he will be found liable, as he must swear distinctly that the debt was paid or extinguished,—*Paul* v. *Allison*, 1841, 3 D. 874; *Stewart* v. *Robertson*, 1852, 15 D. 12. When the debtor is dead, and the debt is referred to his representative's oath, prescription will operate if he swear he is ignorant of the whole matter. An action or diligence raised and executed against one of the obligants on a bill will save prescription as against all the others,—*Roy* v. *Campbell*, 1850, 12 D. 1028.

Bills in hands of Banker.—Before closing these observations on bills, we may advert shortly to their position in the hands of a banker. They come into his hands either as being discounted by him, or as a security for debt, or as being lodged for collection. On a bill being discounted by a banker, he is held to have purchased it, and he is entitled to look only to the parties whose names are on it for ultimate payment.

Bills granted or indorsed to a bank in security of a *special* debt are useful for constituting the debt, and afford a ready means for recovery from any co-obligants on the bill. A bill is sometimes made the foundation of a cash-credit; but this seems very objectionable, as the nature and object of a bill are not such as to admit of continuous operations against it. The cash account bond was called into existence to meet such cases; and *it seems a misapplication of a bill to use it for the purposes of a cash-credit bond.* It is a fixed principle in law that sums paid to the credit of a bond for a specific sum cannot be drawn out again, and that the bond is discharged to the extent of the sums paid. The same principle would appear applicable to a bill, and it would follow, therefore, that a bank's claim against co-obligants on a bill given as a security for a current account would be discharged to the extent of all sums paid in, even though drawn out again. Where there are no co-obligants on a bill which has been made the foundation of an operative account, it is of no practical benefit in the recovery of the debt, as the cheques of the operator would form the vouchers of the claim in any suit against him. The difficulty above alluded to as regards co-obligants may be got over in this way—by discounting the bill and handing the proceeds to the parties. They may then pay in the proceeds to the credit of a deposit account in the name of the person who is to make the operations, the same rate of interest being allowed by the bank on sums at the credit of the deposit account as is charged upon the bill. If the bill be not retired at maturity the bank has a lien over any sum at the credit of the deposit account, and may appropriate it towards payment of the bill.

A bill made payable by the acceptor at his banker's is held a sufficient authority to the banker to apply any funds of the acceptor's in his hands in payment of the bill, or to debit the acceptor's account with it (see page 38). The banker must, however, satisfy himself that the acceptance is genuine, and that all indorsements on the bill are also genuine or authorised, since, as to the former, he is bound to know the signature of his

customer; and, as his duty is to pay the bill against a valid discharge only, it is clear he does not get that if he pays on a forged or unauthorised indorsement. If he has been misled in any material point by his principal, he is not responsible for the genuineness of previous indorsements. The genuineness of the *drawer's* signature is admitted by the acceptance. If a banker pays a bill on which his customer's name, as acceptor, is forged, he must, in order to recover the amount from the party who presented it, give him notice of the forgery on the day of payment, so that he in turn may be in a position to recover from previous parties. In order to avoid responsibility in this connection, a banker usually prefers that his customers domicile their bills at their own offices and honour them by cheques. In all cases where this practice is not followed, the banker ought to hold a letter from his customer in terms sufficiently clear to free him from responsibility as to the genuineness of indorsements on such bills.

With regard to bills lodged with a bank for collection, it seems enough to say that the bank is bound duly to present them, and that it is liable for the contents to the party lodging the bills if any miscarriage take place in the negotiation.

Bills forming security of a debt or general balance will be considered under the head of Banker's Lien.

CHAPTER IV.

DOCUMENT BILLS AND CREDITS, ETC.

Document Bills are so designated because they are drawn by foreign merchants against produce shipped by them for constituents; and because the drawers, for their own security, have attached to the bills the shipping documents for the produce against which they have been drawn. There is no peculiarity about the form of this class of bills, except that they usually specify at the close that value has been received in the merchandise against which they are drawn, and for which the shipping documents are attached. These documents being attached, constitute what may be termed a title of conventional ownership to the merchandise, as they invest the drawers and *bona fide* holders of the bill with an absolute collateral security over such merchandise until the bill is taken up. The shipping documents give the holder of the bill a right to warehouse the merchandise on the ship's arrival; to protect it by insurance; and, if necessary, to sell it in satisfaction of the sum due, should the bill not be paid at maturity. Of course, the holder of the document, if he takes delivery of the goods, is subject to the same liabilities for freight and charges as the acceptor for whose account the goods may have been shipped. The shipping documents usually consist of—(1) a bill of lading, which, as explained in a subsequent chapter, is transferable by indorsation; (2) a policy of insurance against the perils of the sea; and (3) a letter of hypothecation under the hand of the drawers, bearing reference to the shipment and the bill drawn against it, and stating that the bill of lading and policy are to be held in security of the sum in the bill, with a power of sale in the event of the bill not being retired. To meet the contingency of the drawee

failing to accept, this letter also authorises the holder, or representative of the drawer, to warehouse the goods at the expense of the latter, and to perform all other acts implied in a right of ownership. Authority is also given to draw on the granter for any deficiency, and, on the other hand, the holder is taken bound to account to the drawer for any surplus. It frequently happens that, by arrangement, the goods are to be insured in this country, and not in the country where they are shipped; and when such is the case, the letter bears that the drawee is to insure and deliver up the policy, authority being given for insurance to be effected on the drawer's own account should the drawee fail to take out a policy. If the merchandise be lost at sea, the holder of the bill and documents is, of course, in right to recover from the underwriters the sum insured. A policy made abroad, but enforceable within the United Kingdom, must be stamped within two months of its arrival in this country, in order to give it validity. Policies made in this country must be stamped before execution.

As the exigencies of commerce require that document bills should be at the call of the acceptor, it is quite settled in practice, and is usually stipulated in the letter of hypothecation, that the acceptor is entitled at any time during their currency to take them up, under discount, at the then current *minimum rate of the Bank of England;* and in some states of the money market this circumstance requires to be kept in view by parties discounting.

Owing to the extension of commerce, document bills have greatly increased in number in recent years, and where the drawers and acceptors are people of reputation and character, and the produce against which the bills are drawn is a staple article, bearing a solid and not a fictitious or temporarily inflated value, the security afforded to discounters is justly regarded as one of a satisfactory and trustworthy character.

The documents constituting the security are simple and easily understood; but, of course, the banker must satisfy himself of the *bona fide* character of the transaction by looking well to the

names of the drawer and acceptor, not forgetting to exercise the same care in regard to the policy of insurance. That these precautions are necessary is obvious from the fact that a bill of loading may contain provisions which practically exempt the shipowner from any liability for the safety of the goods while on ship-board or in respect of delivery.

Bills and other negotiable documents on parties abroad handed to a banker here for discount, or for sale or collection, ought to be taken from substantial parties only, and even then with recourse against them. Where such documents are dishonoured, notarial and other charges are usually very considerable. In the case of documents sold in London by banks on account of their customers, the proceeds are either handed to them or placed to their credit. The purchaser of such documents has a right of recourse against the selling bank in the event of their dishonour. In the Appendix will be found a Form of Letter of Indemnity, which ought to be taken by the bank from customers having large or numerous transactions of this nature.

Credits.—The documents, termed in mercantile phraseology credits, are letters binding the granter to accept the drafts of the grantee for a certain specified sum, at a particular usance; and, when framed in these terms, they are called "clean credits," as indicating that they are not incumbered with conditions of any kind, either in regard to the description of shipments against which the drafts under them are to be passed, or in regard to delivery of shipping documents to the granter at the time of acceptance, or otherwise. But, of course, their terms may be varied and made to suit exactly what the parties to the particular transaction agree upon. They are, for the most part, issued by bankers or wealthy mercantile firms, and the purposes for which they are issued are commonly either (1) to pledge the credit of the granter (who charges a commission for the facility) on behalf of another, frequently not appearing at all on the face of the transaction, in order to enable that other to make purchases, or to get orders executed, which would be

impracticable on the credit of himself alone; or (2) as a means of laying down funds in foreign countries on account of the granters themselves, there to be employed or invested on account of such granters, or used for the purpose of carrying on exchange operations.

The first-mentioned class of credits are usually placed with merchants abroad, and are accompanied by orders for produce, and the merchants may either send home the bills they draw as remittances on their own account, or they may sell them to another in the country where they are drawn, transferring at the same time the credit to the purchaser. In this latter case, the rights of the original drawer are acquired by the purchaser, and he or his representatives present the bill for acceptance, the drawer himself being also liable to the purchaser by virtue of his indorsation. Where credits are granted by banks of undoubted stability, or by wealthy capitalists, shipping documents are of minor importance to the purchasers or discounters of such bills, and the credits in question frequently stipulate that documents are to be delivered on acceptance. In other cases, however, documents are often attached to credit bills, and remain so attached till the bills are paid up, matters in this respect being regulated very much by the weight attachable to the signature of the party granting the credits.

The credits issued by bankers or capitalists for the purpose of laying down funds in foreign countries are usually lithographed in sets of specified amounts on the same pieces of paper on which the bills of exchange to be drawn under them are lithographed; and, for this reason, they are styled marginal credits. When sold abroad the purchaser gets delivery of the credits along with the bills; and when accepted the acceptors remove their credits, as having been purified by acceptance, and the holder then relies exclusively on the bills.

CHAPTER V.

BANKER'S DRAFT OR CHEQUE, BANK NOTES AND I.O.U.'S.

Bank Draft or Cheque.—The Bills of Exchange Act, 1882, 45 and 46 Vict. c. 61, Part iii. (secs. 73 to 82), deals with and codifies the law relating to bank cheques.

Definition.—Section 73 defines a cheque, which includes coupons on Colonial stock certificates (40 and 41 Vict. c. 59, sec. 7), as a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque. A cheque may be made payable either to bearer or to order. The words "on demand" are not essential. It ought to be framed in the shape of a direct order by the drawer on the drawee, and not in the shape of a precatory request. A cheque need not be dated, since if no time for payment is expressed, it is payable on demand; there is no restriction or limit to the amount of a cheque. A cheque which bears date of a Sunday is not invalid on that account, nor by reason only that it is postdated or antedated. While a post-dated cheque may be negotiated for value prior to the date it bears (*Royal Bank of Scotland*, 1894, 2 Q.B. 715), the drawee is not entitled to cash it, and it ought not to be sued on until such date arrives.

A cheque must be drawn in British money—that is to say, a cheque drawn for so many dollars or rupees, or such-like, would be illegal.

All cheques are liable to a fixed stamp duty of one penny (Stamp Act, 1891), which may be paid either by an impressed stamp or by an adhesive stamp. In the latter case, the stamp

should be cancelled by the granter initialing or signing across the stamp, and adding the date. Any person issuing, negotiating, or paying a cheque unstamped, is liable to a penalty of ten pounds; and if a cheque unstamped is presented to a banker, it is competent for him to stamp the cheque, and to charge the drawer's account with the stamp. But this act of the banker will not relieve the drawer or negotiator of the cheque from the statutory penalty. Cheques payable to order, if purporting to be indorsed by the original payee, may be charged by the banker upon whom they are drawn to the drawer's account, even although the indorsation of such payee has been forged (16 and 17 Vict., c. 59, sec. 19), provided the banker pays it in good faith, and in the ordinary course of business.

Bank cheques are negotiable, and indorsation (which may be (1) general, (2) special, or (3) restrictive) imposes liability on the indorser to the indorsee, provided such cheque was duly negotiated according to the custom observed in bills of exchange (*M'Donald* v. *Union Bank*, 1864, 2 Macph. 963). Every holder of a cheque is *prima facie* deemed to be a holder in due course. Cheques, if payable to bearer, may be transferred from hand to hand without indorsation; but cheques made payable to "myself or order" or to "A. or order," or to "the order of A.," require the indorsement of the payee in order to a valid transfer; but A. is, strictly speaking, entitled in any of these cases to receive the money without indorsement. A banker, however, usually asks for the payee's signature by way of a discharge and for the satisfaction of the drawer. A blank indorsement makes the cheque payable to bearer. In a cheque payable to two or more persons jointly, it is negotiated by the indorsement of all, completed by delivery.

A banker who pays a cheque on which his customer's name as drawer is a forgery, must bear the loss, as he is bound to know his customer's handwriting, and may debit his account for sums drawn under his genuine signature only.

If a cheque payable to bearer, or an indorsed cheque payable to order, comes into the possession of a holder for value, who

is ignorant of the transferor's want of title, the drawer is liable in an action on the cheque. It is otherwise in the case of a forged indorsation; in that case the holder can never be a lawful holder, however clear his *bona fides*,—*Bobbet* v. *Pinkett*, L.R. 1 Exch. D. 368. If the sum in the cheque be fraudulently altered, and a larger amount be paid by the banker than the sum originally filled in by the drawer, the difference will fall upon the banker, unless the negligence of the customer has facilitated the fraud.

Presentment of Cheque for Payment.—Section 74 of the Act provides that, subject to the provisions of the Act—(1) Where a cheque is not presented within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid, and suffered actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. (2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. (3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

The general rule is, that the holder of a cheque should present it for payment not later than the day after he receives it. If, however, the bank on which it is drawn be at a distance, the holder is allowed the day after he receives it to transmit it by post. If the cheque be crossed, the holder should lodge it with his banker in time to be presented on the following day, or if the place of presentment be at a distance, in time to be despatched in course of post. A holder of a cheque is not entitled to enlarge the time of presentment by putting it into

the hands of a banker or agent for negotiation. If the cheque is not duly presented in conformity with the above rules, an indorser who indorses it to the holder will be discharged from all liability. Where the banker remains solvent the holder may present the cheque any time within six years, since the drawer will be liable "on the cheque"—not for the "consideration"—until the expiry of such period from its date. In the event of a delay in presentation of, say, several months, the banker might refuse payment of the cheque as being "out of date," but this will not in any way relieve the drawer, who, so long as the drawee has not failed, cannot have sustained any damage (unless it be that in the interval the banker has ceased to permit him to overdraw), and whose duty it is to leave sufficient funds at his credit to meet cheques issued by him. But if the holder of the cheque retains it in his possession beyond the proper time for presentment, and the banker on whom the cheque is drawn becomes bankrupt before payment is obtained, the drawer is discharged from liability to the extent of the difference between the dividend the banker's estate yields, and the amount of the cheque. Bankers receiving from their customers cheques drawn on other parties are bound to have them presented in conformity with the above rules; otherwise, if the cheque is dishonoured, the loss may fall upon themselves. There are some very instructive decisions on this subject, the general tenor of which seems to be that the day after the receipt of the cheque is the last day allowed by the law for legal presentation, so as to preserve recourse against prior indorsers in the event of its dishonour.

A banker is bound to pay a cheque when presented, if the drawer has sufficient funds in the banker's hands to meet it, and if the latter declines, he is liable in damages to the drawer for injury to his credit. A banker, however, is not bound to pay if he hold overdue bills of his customer, as he is entitled to apply the funds in payment of these. It is also a sufficient ground of refusal if the banker has, before presentation of the cheque, applied the customer's funds in payment of his

acceptances made payable at the banker's, that form of acceptance being a sufficient authority to the banker to retain the bills. In the case of *Ireland* v. *The North of Scotland Banking Co.*, 1880, 8 R. 215, it was held that the bank was not entitled to withhold payment of a cheque for £100 drawn on the account of an executry estate, for which they held £413 on account-current, on the ground that the estate was insolvent, and that the bank, which had a claim for £130, intended to apply for sequestration of it. While some consideration is due to the customer, and in courtesy almost invariably extended, the mere fact that the bank has on former occasions allowed the customer to overdraw his account does not in any way operate so as to bar the money-lender from stopping his advances, whenever he shall deem it expedient to do so,—*Ritchie* v. *Clydesdale Bank*, 1886, 13 R. 866. When a cheque is presented to a banker, and the banker has not sufficient funds to answer the demand, the proper reply to give to the presenter is "insufficient funds," and should the holder of the cheque inquire how much stands at the drawer's credit with a view to paying in the difference, and so getting payment of the cheque, such payment, it is understood, would be reducible, as being in prejudice of the other creditors of the maker of the cheque. It follows accordingly that in such cases a bank is not bound to pay a cheque in part. A cheque, however, when presented for payment operates as an intimated assignation of any funds of the drawer in the hands of the bank up to the amount of the cheque, and this although the bank is only indebted to the granter to a less amount than that contained in the cheque,—*British Linen Co. Bank* v. *Carruthers and Fergusson*, 1883, 10 R. 923. This case was decided at common law, but in Scotland the law is unchanged by the Bills of Exchange Act,—see sections 53 and 73.

Dishonoured Cheques.—In case of dishonour, the provisions of the law as to bills payable on demand apply to cheques, except, it is understood, that they cannot be protested for summary diligence, the Act of 1882 leaving the law and practice in this

respect unaltered. A protest taken will, of course, afford conclusive evidence of the presentation of the cheque, and will be useful to preserve recourse.

Revocation of Banker's Authority.—Section 75 provides that the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—(1) countermand of payment by the drawer; (2) notice of the drawer's death. The death of the drawer of a cheque does not amount to a countermand of it, if it was given to the payee in payment of a debt, or as a donation; but if the death of the drawer be known to the banker, he will be justified in refusing to pay the cheque until he has ascertained whether the holder is entitled to demand payment,—*Bryce* v. *Young's Executors*, 1866, 4 Macph. 312. Apart from statute, a banker may have certain good reasons for refusing payment of cheques drawn upon him. The bank, for instance, may have a legal right of retention, or its customer may be notour bankrupt or sequestrated, or, again, an arrestment may have been used against the funds. As regards the right of the drawer to stop payment of a cheque, it seems settled that such stoppage in no way affects the right of a holder for value, who may raise an action of multiplepoinding in the banker's name; but the banker is not bound to pay where the drawer has stopped payment of the cheque.—See *Waterston* v. *City of Glasgow Bank*, 1874, 1 R. 470. It has been held in England that a London banker who accepted cheques in payment of certain bills sent by a country correspondent for collection was not guilty of negligence in taking the cheques as payment of the bills, though the former were afterwards dishonoured.

Crossed Cheques.—The Bills of Exchange Act, sections 76 to 82, recognises the following ways of crossing a cheque. (1.) Where a cheque bears across its face an addition of (*a*) the words "and Company," or any abbreviation thereof, between two parallel transverse lines, either with or without the words

"not negotiable," or (*b*) two parallel transverse lines simply, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed generally. (2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker. A cheque may be crossed generally or specially by the drawer. Where a cheque is uncrossed, the holder may cross it generally or specially. Where a cheque is crossed generally, the holder may cross it specially. Where a cheque is crossed generally or specially, the holder may add the words "not negotiable." Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection. Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself. A crossing authorised by the Act is a material part of the cheque, and it is not lawful for any person to obliterate, or, except as authorised by the Act, to add to or alter the crossing. Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn must refuse payment thereof. Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Provided that where a cheque is presented for payment, which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by the Act, the banker paying the cheque in good faith and without negligence is not responsible nor incurs any liability; nor can the payment be questioned by reason of the cheque having been crossed, or of the crossing having been

obliterated, or having been added to or altered otherwise than as authorised by the Act, and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be. Where a banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, are respectively entitled to the same rights and are placed in the same position as if payment of the cheque had been made to the true owner thereof. Where a person takes a crossed cheque which bears on it the words "not negotiable," he has not and is not capable of giving a better title to the cheque than that which the person from whom he took it had. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment, since he acts merely as agent,—*Clydesdale Bank* v. *Royal Bank*, 1876, 3 R. 586.

It will be noticed that under these sections either the drawer or the holder may cross a cheque; in the case of a cheque made payable to A. or order, no one except A., or some one to whom he has indorsed it, can ever become the holder; no one can hold on a forged indorsation. On the other hand, if the cheque be made payable to bearer, either by the drawer or by the indorser, whoever has possession, although he may have obtained it illegally, is the holder of the cheque, and may cross it as authorised by the Act. Nothing in the Act affects the negotiability of crossed cheques, unless they are marked "not negotiable," and a holder of a crossed cheque for value, although he hold it from a thief or a finder, may use the cheque as an assignation for the amount, and sue the banker for payment, should he refuse it. In one case, where a party paid into his bank account

a cheque crossed with the name of his banker, and was allowed to draw against the sum, it was held, on the subsequent dishonour of the cheque, that such crossing did not restrict its negotiability to the bank, and that, as holders in due course, they could recover upon it,—*National Bank* v. *Silke*, 1891, L.R. 1 Q.B. 435. A banker who in any way disregards the crossings on a cheque forfeits the protection given to him by section 60, in the case of his having in good faith paid a cheque, the indorsement on which has been forged. These provisions as to crossed cheques also apply to warrants for payment of dividends (sec. 95).

Letter of Credit.—A letter of credit is one form of mandate whereby authority is given by the granter to another to honour the drafts of the person named, to the extent mentioned in the letter on behalf of the granter. Such credits are distinguished as (1) general, (2) special.

A general letter of credit specifies the payee, but need not restrict the sum or the time during which the credit is to subsist. It is not addressed to any one specially, the granter's undertaking being to refund whoever may have paid, in accordance with its terms, to the payee. So long as a party, in advancing money on the strength of such letters, does so strictly in terms of the letter, he is entitled to look to the granter for repayment, and his position is not affected by any question which may have arisen between the granter and the payee after issue of the letter. To this extent a general letter of credit may be considered a negotiable document.

A special letter of credit is addressed to a person or persons. In the case of banks such letters are addressed to correspondents whose names are given to the payee. Such letters are not negotiable, but may be indorsed for value to another. The risk attaching to the taking of a non-negotiable document must, however, be kept in view.

By the Stamp Act, 1891, a letter of credit granted in the United Kingdom, to be acted upon abroad, but payable within the United Kingdom, does not require a stamp.

The question whether letters of credit could or could not be transferred by indorsation came before the Court of Session in the case of *Struthers* v. *Commercial Bank of Scotland*, 1842, 4 D. 460. Considerable difference of opinion prevailed among the judges on the subject, and the majority held that a letter of credit was not transferable by indorsation, so as to entitle the indorsee to draw the money in his own right; but that the payee, in putting his name on the back of the letter, gave an irrevocable mandate to the Commercial Bank of Scotland, who had cashed the letter of credit, which entitled them to the sum contained in it, notwithstanding the intervening bankruptcy of the payee. The ground of that decision appears to be that the mandate, not being gratuitous, could not be revoked by the bankrupt or his creditors. In the same way, when the holder of a circular note puts his name on the back of the note, he authorises the banker cashing it to fill up the blank draft which is indorsed upon it with his own name as payee.

It may be observed that circular notes partake somewhat of the nature of letters of credit. They are issued by banks, against their face value in money, along with a "letter of indication." Such notes are cashed abroad, usually at the current rate of exchange on London.

Draft payable to Order on Demand.—This document has, as we have said, virtually taken the place of the old letter of credit. The form of the draft is as under :—

"*Bank of Scotland*,
"*Edinburgh*, 1*st January* 1901.

"*To* Messrs. Smith, Payne, & Smiths, London.

"On demand, pay to *A. B.*, or order, One Hundred Pounds, charging the same in account with the Bank of Scotland."

This document is purposely framed so as to bring it under a clause in the 16 and 17 Vict. c. 59, section 19, by which bankers are protected from being called upon to pay a second claim, although the signature of the payee named in the draft

be forged; and this protection, it may be observed, passes to the signature per procuration of the payee. In order to throw the risk of forgery upon the banker, a *currency bill* would require to be purchased from him, drawn on his correspondent in the town to which the money is to be transmitted. This adds the cost of the bill stamp to the expense of the remittance, but the additional expense is fully met to the purchaser by his being made sure, either that the money cannot be paid except on the genuine indorsement of the payee, or that a banker paying on a forgery will be liable in second payment to the purchaser of the bill.

Bank Notes.—Bank notes are promissory notes payable to the bearer on demand, and pass from hand to hand by delivery. In England, bank notes under £5 are illegal. In Scotland, bank notes must be for one pound or some whole number of pounds; but although £2 notes and guinea notes were at one time issued in Scotland, the practice has been discontinued, and the notes issued in Scotland consist now only of £100, £20, £10, £5, and £1. Bank of England notes are a legal tender in England, except as regards that Bank and its branches. The Bank of England notes are not a legal tender in Scotland, nor are the notes of the Scotch banks. The receiver of these takes them at his peril. Bank notes do not come under the sexennial prescription, but they are subject to the long negative prescription. Silver is a legal tender to the amount of forty shillings only, and bronze to the amount of one shilling, but no more. The issue of bank notes in Scotland is regulated by 8 and 9 Vict. c. 38, and 17 and 18 Vict. c. 83. The last-mentioned Act contains a statutory definition of bank notes.

If a sum named in a bank note be fraudulently altered to a larger sum, as from 10 to 20, this being a "material alteration," the note, as such, is destroyed; but the bank will nevertheless be liable to pay the sum which the genuine note originally represented to a holder in due course, if the alteration be not apparent. Summary diligence is competent on a bank note.

By Act 42 and 43 Vict. c. 76, no bank of issue registered as

a limited company is entitled to limit the liability of its shareholders in respect of its notes.

I.O.U.'s.—The validity of these documents has been sustained by law; but no prudent banker should have anything to do with them. An I.O.U. does not require a stamp, as it is only evidence of the existence of a debt. It should contain date, the three letters "I.O.U.," the sum, and the debtor's signature. It should also contain the creditor's name and address, but this is not essential to its validity. In *Paterson* v. *Paterson*, 1898, 25 R. 144, it was decided by a majority of the whole Court that an I.O.U. need not be holograph or tested, parole evidence being admissible to identify and set up the writing, but not to prove the obligation to repay. It is not negotiable. An I.O.U. is a mere acknowledgment of debt, as distinguished from a bond or obligatory instrument, and the holder ought to sue on the debt, not on the acknowledgment, which is only evidence of the granter's indebtedness at its date,—*Neilson's Trustees*, 1883, 11 R. 119.

The form of I.O.U. given in the Appendix ought to be adhered to, since there is risk of importing into it a "promise," thus rendering it liable to stamp duty as being a promissory note; or of bringing it under a "form of agreement," in which case, if for a sum over £5, a stamp is also necessary.

CHAPTER VI.

DEPOSIT-RECEIPT, MANDATE, AND PROCURATION.

Deposit-Receipts.—A deposit-receipt is a voucher given by bankers to their customers for sums lodged otherwise than on current account. These receipts, as issued by the Scotch banks, are invariably payable on demand, and bear interest from their date, but no interest is allowed where the money is uplifted within thirty days from the date on which it was lodged. If, however, only part of the deposit be uplifted within that period, it is usual, in granting a fresh receipt for the balance, to mark thereon that interest will be allowed on such balance as from the date of the previous deposit-receipt. If by its terms a deposit-receipt is payable to more than one person (*e.g.*, to two or more, or to "either or survivor"), or on a contingency, a penny stamp must be affixed to it and cancelled. If payable to the person who deposited the money, no such stamp is necessary. On repayment, however, deposit-receipts are, in every case, liable to stamp duty of one penny. It was long a matter of doubt, whether a deposit-receipt was a negotiable document and transmissible by indorsation. This question has over and over again exercised the Judges of the Court of Session. The result of several decisions seems to be, that the indorsation of a deposit-receipt is a mere mandate to uplift the money from the bank for behoof of the owner. It confers no right of property in the money, and the party uplifting it is bound *prima facie* to account for it to the owner of the receipt. Hence it follows that, by the death of the granter, a party in possession of a deposit-receipt *gratuitously* indorsed has no power to uplift the money from the bank after

the death of the owner of the receipt, and that the bank would not be in safety to pay it, especially if the owner's death were known or intimated to them.

Questions have frequently arisen whether deposit-receipts indorsed by the holder, and found in possession of a third party after the holder's death, inferred a donation of the contents. In the case of *Keddie* v. *Christie*, 1848, 11 D. 145, where a father deposited money in his son's name, and the receipt was found *undelivered* in the father's repositories, it was held that the son had no preference in the sum deposited. Had the deposit-receipt been in the *son's* possession, it is probable that a donation *mortis causa* would have been established,—*Kennedy* v. *Rose*, 1863, 1 M. 1042. A good deal of litigation has taken place with regard to the effect of a deposit-receipt taken in the name of the depositor and of another person, payable to either or the survivor of them. It is quite settled that the mere terms of such a receipt will not overcome the legal presumption against donation. In the earlier cases it was laid down that delivery to the donee was essential; but in *Crosbie's Trustees* v. *Wright*, 1880, 7 R. 823, and *Macfarlane's Trustees* v. *Miller*, 1898, 25 R. 1201, it was held that although delivery is a strong indication of the granter's intention, it is not essential, but a donation will be set up if the *animus donandi* be otherwise proved.

Payment of Receipts to Parties.—It is common for bankers to issue deposit-receipts in favour of two persons, to be drawn by either. So far as the bank is concerned, it seems pretty clear that in such a receipt it will be held that the money belonged to both parties in equal halves; but bankers are in the habit of paying such receipt on the indorsation of either of the parties without making any inquiry as to the disposal of the money, acting on the doctrine that by the terms of the receipt there is an expressed mandate, so long as both parties are alive, that the money should be uplifted by either. The rule of the law being, as we have seen, that gratuitous mandates fall by death, it follows that if the bank know of the death of

one of the granters, they cannot in safety pay the contents of the deposit-receipt to the survivor without the consent of the legal representatives of the deceased. If, however, the bank, in ignorance of such death, pay the amount entered in the receipt, it is thought they are not liable. In such cases the legal representatives are the executors confirmed by the Sheriff. To avoid the questions which have arisen with reference to receipts payable to either of two parties, the words "or the survivor" should be inserted; and it seems to be pretty well understood that, *as regards the bank*, the contents of a deposit-receipt may be safely paid to the survivor. But as the property of the money is not determined by the words of the receipt, the proper course is for the banker to get the consent of all parties interested.

A bank is not bound to honour its customer's cheque drawn against a deposit-receipt, but the bank may, on obtaining delivery of the receipt properly indorsed, agree to advance money by way of overdraft on security thereof. A bank may likewise make such an advance to a third party, but in this event it should hold, along with the indorsed deposit-receipt, a letter, bearing a sixpenny stamp, descriptive of the proposed transaction.

A deposit-receipt in possession of a bank, indorsed by the party in whose favour it was granted, is, according to a well-known rule of law, presumptive evidence of payment. The indorsation may be treated by the bank either as a draft or a discharge for the sum in the receipt, and either of these they would be entitled to write above the indorsation if necessary. It occasionally happens that a deposit-receipt is lost. Where this happens the bank usually pays the amount under the discharge and guarantee of the parties named in the receipt, and of a substantial cautioner. A guarantee society will, for a consideration, act as cautioner in such cases.

Receipts issued to a married woman formerly fell under the *jus mariti*, and a husband might demand payment on his own indorsation, but now, under the Married Women's Property (Scotland) Act, 1881, the moveable estate of the wife is excluded from the *jus mariti* of the husband, and the income of such

estate is payable to the wife on her individual receipt. In a recent case (*National Bank* v. *Dixon and Another*, 1893, 21 R. 4), it was held that money belonging to the wife, lodged with money of her husband on deposit-receipt payable "to either or survivor," was "immixed" with the husband's funds. It would therefore be liable to diligence by his creditors.

It may be proper to notice here the effect of the indorsation of a deposit-receipt by a X made before witnesses, by a party who cannot write. The general rule of law is that all deeds, where the granter is incapable of writing, must be executed by a notary, or a Justice of the Peace, before two witnesses; but in order to facilitate business, this method of discharging a deposit-receipt is usually dispensed with by bankers, and the practice is to pay on the grantee indorsing the receipt with his or her mark before witnesses (who should also add their designations and addresses), the receipt being viewed as a writing *in re mercatoria*.

Since a bank may be liable in repetition of the amount of a deposit-receipt paid to a wrongful holder, the safer course, where the bank has any doubt as to the identity of the party presenting, is to require an indorsement in due form, before and by a notary or Justice of the Peace.

Receipts for Judicial and other Consignments.—Judicial consignments (now regulated by the Court of Session Consignations (Scotland) Act, 1895) are generally payable to the party preferred to the fund by decree of the Court. The only observation requiring to be made as to the payment of such receipts is to see that the interlocutor contains a distinct warrant on the bank to make payment to the party named. Bankers sometimes pay such consignments on a certified copy of the interlocutor finding a party entitled to the sum consigned, but this course is very objectionable, as a reclaiming note, or an appeal to the Sheriff, may, without the banker's knowledge, be lodged against the interlocutor, and the latter might be reversed. The safe course, therefore, is to pay on an official extract of the decree, of which the bank generally gets delivery, or on a certi-

fied copy of the interlocutor, containing an order on the banker to pay. If the decree contains other matter, the bank usually gets an official copy of the extract.

It may be here noted that, under the Pupils Protection Act, 12 and 13 Vict. c. 51, sec. 37, the interest on judicial consignments, or on consignments by judicial factors, tutors, or curators, must be accumulated with the principal at least once a year by the bank.

Under the Titles to Land Consolidation Act, 1868, the creditor is directed to consign the surplus of the price which may remain after paying the heritable debt and expenses, and prior incumbrances, in any of the banks in Scotland incorporated by Act of Parliament or Royal Charter, or their branches, in the joint names of the seller and purchaser, for behoof of the party or parties having best right thereto. The consignment has the statutory effect of clearing the property of all posterior security. These consignments may be paid on the receipt of the seller and the purchaser. In the event of any difficulty or dispute arising as between them, the proper course for the bank to follow is to have the matter determined in Court by a multiplepoinding. In like manner, the redemption money of a bond or a disposition in security may be consigned in bank by the debtor to be made forthcoming on the part of the consigner to the creditor in the bond, or those in his right. The effect of this consignation is to clear the property of a bond where a valid discharge cannot be obtained from the creditor. The receipt may be paid on the discharge of a creditor, or those in his right, with the consent of the consigner. (See Appendix for forms of these documents.)

Mandate, Factory and Commission.—A mandate is an authority by one party empowering another to exercise a right, or rights, in his place. If the business to be transacted be of value and importance, the authority under which it is managed is called a factory and commission, or a power of attorney. Factories and commissions, though executed with the legal

solemnities, are, properly speaking, of the nature of a mandate. Mandates are generally used in connection with mercantile transactions, and are therefore privileged by law. They are simple in their form, and do not require to be tested.

Factories are either general or special in their character. In practice, general and special powers under factories and commissions are usually combined. In all transactions with parties acting on the strength of such documents, a safe rule is to assume that the factor has only such powers as are clearly conferred on him thereunder. A general factory, or mandate, confers general powers of management only, such as the collection of rents, interest, dividends, and outstanding debts, and such acts of administration as are clearly within the scope of the employment. A factor or mandatory, therefore, acting under a general authority merely, has no power to do any extraordinary act so as to bind the principal or mandant. He cannot, for example, sell his constituent's heritages or moveables of value, such as the stock of a bank or other public body. He cannot borrow money in name of his constituent; nor, as we shall afterwards see, can he pass cheques upon his constituent's bank account, or uplift his money from bank. If it is wished to confer power upon a factor to do all or any of these things, his factory must contain special powers to that effect.

A special factory, or mandate, limits the mandatory's power to the particular thing or things which he is authorised to do. They are rigidly interpreted; so that parties dealing with mandatories require to be on their guard, to see that the powers exercised by the mandatory are contained in his authority. A mandate authorising a party to operate on a cash or current account only authorises operations within the sum at credit, and does not imply authority to sign bills, or to transfer money in the principal's name on deposit-receipt to account-current, as an additional fund to draw upon. Parties dealing with factors, mandatories, or procurators are held to have perused the authorities under which they act, and to be aware of the extent of their power.

A mandate is a personal authority. A factor or mandatory, there being *delectus personæ* in his appointment, cannot delegate his powers to another, but he may terminate the factory by renunciation of the office. Mandates fall by the death or bankruptcy of either the mandant or mandatory. If, however, the matter authorised in the mandate be entered upon but not concluded, the mandate does not necessarily fall by the death of either party, and may be concluded, in cases of urgency at least, by the mandatory himself in the one case, or by his heir in the other. Also, where the mandatory acts in ignorance of the death of the mandant, his actings under the authority of the mandate bind the mandant's representatives. Mandates may be recalled by written intimation to the parties with whom the mandatory transacted or was entitled to transact. They may also in certain cases be recalled by implication, as, for example, by the appointment of another mandatory, or by the need of a mandatory ceasing to exist. When granted, for instance, on the narrative of the principal's intention to go abroad, and appointing the mandatory to act in his absence, on the return of the granter to the country the mandatory's power ceases, and parties in the knowledge of the granter's return are not safe in dealing with the mandatory. Again, where a mandate is given to act during the granter's indisposition, his restoration to health amounts to a recall of the mandate in a question with a party who was aware of that fact.

A mandate, in the form of a letter addressed to a bank, which simply authorises a named person to operate on the granter's account, is not liable to stamp duty. (See Appendix for form.)

Procuration.—A procuration to sign bills and cheques may be constituted by writing; or it may be implied from a course of dealing with the principal and agent, or from facts and circumstances showing that the principal had recognised and adopted bills or cheques drawn by a procurator who had no written authority. Sections 25 and 26 of the Bills of Exchange

Act, 1882, define procuration. There is no special form for a written procuration. It may be validly constituted by a simple letter authorising the party named to sign the bills and cheques of the granter per procuration. But such letter must be stamped with a duty of 10s. It is desirable, where bills drawn or accepted by a procurator are offered for discount, that the banker should see that the procurator has a written authority to act, as this may save difficult questions in the event of a dispute with the principal.

Procuration may be implied in certain cases where the procurator has no written authority; but the holder of a bill so drawn or accepted, in any question with the principal, must be prepared to aver and prove specific instances where the principal had previously adopted or recognised similar acts of the procurator. It is not enough to say that the procurator was the agent or clerk of the principal, and that he was generally reported or understood to have power to sign per procuration. This is well illustrated by the case of *Swinburne* v. *The Western Bank*, 1856, 18 D. 1025. The bank charged Swinburne to pay a bill drawn and indorsed by A. W. Galloway, per procuration of Swinburne. Swinburne suspended the charge on the ground that Galloway had no power to sign bills per procuration. The bank, in answer, averred that Galloway was the admitted and known agent of Swinburne; that he had discounted numerous bills so drawn and indorsed; and averred generally that Swinburne knew of all this. They failed, however, to specify particular instances where such bills had been recognised or adopted by Swinburne, and the Court held their averments irrelevant, and declined to send the case to a jury. In the case of *Sinclair, Moorhead, and Co.* v. *Wallace and Co.*, 1880, 7 R. 874, an agent with full power to carry on the business of his principals in another town, and with a written authority to sign receipts, bills, cheques, &c. per procuration of his principals, borrowed money on the representation to the lender that it was for use in his principal's business, and granted the lender a bill of exchange, blank in the drawer's name, but signed by him

per procuration of his principals for the amount. He used the money ultimately in reducing a deficit in his principal's bank account caused by his malversations. The agent absconded, leaving heavy defalcations. The holder of the bill having charged the principals upon it, in a suspension of the charge it was held that, in the absence of express power to borrow, the agent was not entitled to do so, and that, even assuming the money to have been applied for the benefit of the principals, that did not make them liable.

Implied Mandate.—The principles laid down by the above decision are generally applicable to cases of all implied mandates, and show that great caution should be exercised in dealing with a mandatory who has no written authority from the principal. Two cases of implied mandate may be here adverted to as affecting bankers. The first is that of *Forbes' Executor* v. *The Western Bank*, 1854, 16 D. 807. Here a party lodged £400 on deposit-receipt. She entrusted the receipt to C. Walker, her law-agent. Some time afterwards the receipt was presented by Walker, bearing to be indorsed by the holder with her mark, and witnessed by Walker's clerk. A renewal of the receipt was obtained for the same amount, the interest being paid to Walker, and by him to the party in whose favour the receipt was. Subsequently, Walker got payment of the last receipt on presenting it, bearing a similar indorsation with the first. The executors of the grantee afterwards raised an action against the bank for payment of the sum in the receipt, averring that the marks indorsed on it were not made by or with the authority of the grantee. It having turned out that the marks were made by Walker's clerk, and not by the grantee, the bank pleaded that her own agent, who was in possession of the receipt, must be held to have implied authority to receive payment of it; but the Court refused to give effect to this view, and held the bank liable in payment to the grantee's executors. The next case is that of *Sir William Drummond Stewart* v. *The Central Bank of Scotland*, 1859, 21 D. 1180. Here a sum of £300 was deposited

in name of Sir William by his accredited factor. The sum was afterwards paid by the bank to the factor, on the receipt being indorsed by him for Sir William D. Stewart. Some years afterwards disputes arose between Sir William and his factor as to the accuracy of his accounts; and it being discovered that the factor had uplifted the above sum from the bank, Sir William raised an action against the bank for payment, on the ground that the factor had not power to uplift and discharge the receipt, his factory containing powers of general management only. The Lord Ordinary decided against the bank on this ground; but the Court reversed the decision on various special grounds, and, among others, that the factor had taken credit for the deposit in his accounts, and had produced the receipt to the agent of Sir William Stewart, who audited the accounts, and that Sir William afterwards compromised all his claims against the factor and discharged his representative. The case, however, is important, as bearing on the powers of general factors, and showing that they have no power to uplift their constituents' money from bank where they are not specially authorised to do so.

CHAPTER VII.

CAUTIONARY OBLIGATIONS.

As we shall have occasion to consider hereafter various writs, such as the Guarantee and Cash-Credit Bond, which are regulated to some extent by the rules of law applicable to cautionary obligations, it may be as well, in the first instance, to give a general statement of the law regarding these writings.

A cautionary obligation is an undertaking by which one party interposes his credit as surety for another, and engages to pay the debt, or perform the act, which the principal has engaged to do, if he shall fail to pay or perform.

Cautionary obligations are of two kinds, termed proper and improper,—proper where the surety is *ex facie* of the obligation bound simply as a cautioner; and improper, when he is bound conjunctly and severally with the principal as full debtor, though in point of fact a cautioner merely.

Constitution.—Under the Mercantile Law Amendment Act, 1856, section 6, it is required that a cautionary obligation or guarantee be in writing and subscribed by the person undertaking the same, or by some person duly authorised by him. A probative or holograph writing would appear to be necessary unless the transaction be *in re mercatoria*. An undertaking to give a guarantee "when required" has been held a good cautionary obligation in the sense of the Act,—*Wallace* v. *Gibson*, 1895, 22 R. (H.L.) 56.

A cautionary obligation granted by several parties must be signed by the whole of them, or those who may have signed cannot be held bound. An exception to this rule may be found where, from the nature of the transaction, unless the signature

of the others be expressly a condition, the creditor has been induced to rely on the names already adhibited. In any case the principal debtor remains bound. In a case where a bond of caution purported to be granted by several parties, and the signature of one of them was forged, all the cautioners were held to be free from the obligation,—*Provincial Assurance Company* v. *Pringle*, 1858, 20 D. 465. A distinction, however, was made between an extrajudicial and a judicial bond of caution in the case of *Simpson* v. *Fleming*, 1860, 22 D. 679, where it was held, founding on the mode in which such bonds are prepared and executed, that one of two cautioners in a bond, lodged in a process of suspension before the Court of Session, was bound, though the signature of the co-cautioner was forged. The creditor need not be named in the bond of caution, provided he is otherwise indicated with reasonable certainty. Thus, it has been held that an obligation as surety for a composition on a bankrupt estate was not void by reason of the creditors not being named, it being quite clear who the creditors were,—*Clapperton and Co.* v. *Anderson*, 1891, 8 R. 1004.

Construction.—At entering into a cautionary transaction there must be fair and open dealing on the part of the creditor, and every condition on his part requires to be fulfilled. If a statement which is material to the risk be made by the creditor, either voluntarily or in answer to a question by an intending cautioner, the cautioner is free, unless the statement is true, even although the misrepresentation be made innocently. On the other hand, the creditor is under no obligation to communicate facts within his knowledge regarding the debtor's position. In cautionry for the performance of an office, the creditor is bound to disclose to the intending cautioner all facts known to him likely to affect such party in deciding to interpose his suretyship, otherwise he will be free,—*Cameron* v. *French*, 1893, 20 R. 966. But there is no duty upon a bank agent to give information to a proposed cautioner in regard to the state of the principal's account unless he is asked, when any statement he

may make must be a full and fair one; and essential error, where not induced by the bank, is no ground for reduction in a question with the bank,—*Young* v. *Clydesdale Bank, Ltd.*, 1889, 17 R. 231. These obligations are rigidly interpreted, and the cautioner is entitled to plead every defence competent to the real debtor. It is incompetent for a cautioner to prove by parole a qualification of his written obligation,—*Macpherson* v. *Haggarts*, 1881, 9 R. 306.

Discussion.—Previous to the passing of the Mercantile Law Amendment Act, 19 and 20 Vict. c. 60, cautioners were entitled to what is called "the benefit of discussion;" but the 8th section of that Act declares that "it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt, . . . to discuss or do diligence against the principal debtor as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them, and to use all action or diligence against both or either of them which is competent according to the law of Scotland." The Act, however, reserves power to any cautioner to stipulate in the instrument of caution that the creditor shall be bound, before proceeding against him, to discuss and do diligence against the principal debtor. The Act applies only to cautioners for debt, and does not affect cautioners *ad facta præstanda*. Discussion is accomplished by giving the principal debtor a charge to pay on a decree of the Court, and recording the charge in the Register of Inhibitions, which by the Personal Diligence Act is declared to have the same effect as if the debtor had been denounced rebel; or by poinding, or arrestment and furthcoming of his moveables; or by adjudication of his heritable estate. Bankruptcy is held to be equivalent to discussion; as also absence from the kingdom, if the debtor has no estate in the country.

Relief.—A cautioner who pays the debt has a claim of total

relief against the principal debtor, and a right of relief against his co-cautioners to the extent of any surplus beyond his own rateable proportion of the debt, if, as in the usual case, the cautioners are bound jointly and severally. The right of relief arises on actual payment of the debt by the cautioner, or on his being distressed for it; if the debtor be *vergens ad inopiam*, an action for relief will, on equitable grounds, be sustained. The creditor on receiving payment is bound to assign to a cautioner the debt and diligence and any securities held by him, so as to enable the cautioner to operate his relief. A cautioner seeking relief against his co-cautioners is bound to communicate to them the benefit of any ease or security he has received from the creditor or the principal debtor. Where the debt has been assigned to a party in trust for one or more of the co-obligants, he cannot use the assignation so as to bar the claims of relief among the co-obligants,—*Gilmour* v. *Finnie*, 1832, 11 S. 193.

The creditor is likewise bound to act fairly and justly towards the cautioner, and not to use his right so as to prevent the cautioner from operating his relief. In the case of *Ewart* v. *Latta*, 1863, as reversed by the House of Lords, 1865, 3 Macph. (H.L.) 36, it was held that a trustee on the bankrupt estate of a cautioner was not entitled to an assignation of the creditor's rights against the principal debtors, without making full payment, and that payment of a dividend was not full payment.

If a new cautioner interposes his credit by a corroborative obligation at the request of the debtor, he is only entitled to a rateable relief as against the former cautioners; but if he becomes bound at their request and on their account he is entitled to total relief from them,—*Lennox* v. *Campbell*, 1815, F.C. In case of doubt the former state of matters is presumed.

Retention by Cautioner.—The opinion has been expressed that a cautioner for a debt then due may retain against a creditor of the principal arresting in his hands. If the debt is future and contingent, there is no right of retention except where the principal is *vergens ad inopiam*,—Lords Young

and Craighill, in *M'Pherson* v. *Wright*, 1885, 12 R. 942. The rule is that co-cautioners must communicate to the other cautioners a proportional share of any security or relief which they may hold from the debtor. If, however, the cautioner at the time he became bound stipulated for a certain security and received it, with consent of the other cautioners, he is not bound to communicate any portion of such security to them,—*Hamilton* v. *Freeth*, 1889, 16 R. 1022.

Relief of Cautioners inter se.—Cautioners who are not bound jointly and severally are entitled to the benefit of division. This benefit renders a cautioner liable only for his own proportion of the debt so long as the co-cautioners are solvent; but on the insolvency or bankruptcy of any of the cautioners, the creditor is entitled to go against the solvent obligants for the whole debt. The rule of law applies to all obligants bound *pro rata;* and, consequently, though they are liable in the first instance only for a proportion of the debt, yet any one of them may ultimately be liable for the whole on the bankruptcy or insolvency of the others. Where the cautioners are bound conjunctly and severally with the principal debtor, they have not the benefit of division. In the case of *Morton's Trustees* v. *Watson*, 1892, 20 R. 72, it was observed that a bond by the partners of a firm for a loan to the firm would bind each partner as a full debtor, although by the terms of the bond such individual liability was not expressed, each partner being liable for the whole debts of the firm.

Discharge of the Cautioner.—A cautioner may be discharged (1) directly; (2) indirectly. A discharge of the debtor, without the consent of the cautioners, is a discharge of them also. And, by the 9th section of the Mercantile Law Amendment Act, a discharge to one cautioner, without the consent of the others, is a discharge to all the cautioners. This provision applies only to cautioners who are bound jointly and severally,—*Morgan* v. *Smart*, 1872, 10 Macph. 610. The creditor, however, may consent to

a discharge of the debtor, or any of the cautioners, in a sequestration of their estates under the Bankrupt Act, without relieving the other obligants,—19 and 20 Vict. c. 79, sec. 56; but if he accepts a composition under a private arrangement from the debtor, or from any one of the cautioners without consent of the others, they will be free. It is, however, laid down by Professor Bell in his "Commentaries," that if a cautioner, after the insolvency of the principal debtor, refuses to pay the debt, it is not to be expected that a creditor shall abstain from taking what he can get from the debtor's estate; and that the creditor may safely take the composition after having given due notice to the cautioner, provided he reserve his recourse against the cautioner in his discharge to the debtor. It was held, in the case of *Smith* v. *Ogilvie*, 1821, 1 S. 159, that a discharge to the principal debtor, wherein it was stipulated that it would have no effect if the cautioners were thereby relieved, did not free the cautioners.

Cautioners will be discharged by any change in the transaction by which their interests are affected, if the change is made without their consent, unless it is immaterial or to the benefit of the cautioner. Thus, in the case of *Bonar* v. *Macdonald*, 1850, 13 D. (H.L.) 26, the House of Lords, affirming the judgment of the Court of Session, held that the cautioners for a bank agent were free, the bank having, without notice to the cautioners, changed the nature of their arrangements with the agent, by which he was subjected to additional loss on discounted bills. If the cautioner's rights are injured by any act of neglect on the part of the creditor they will be free. Thus, if the debt is allowed to prescribe, or if the creditor neglects to complete any security given to him, the cautioner is relieved. Another example will be found in the case of *The British Guarantee Association* v. *The Western Bank*, 1853, 15 D. 834, in which an averment, to the effect that the bank omitted to check the teller's cash in the way pointed out in the proposal submitted to the Association, was held relevant to free the latter as surety for the teller.

The case of *Murray* v. *Lee*, 1882, 9 R. 1040, is instructive.

There A. was due B. £29, and granted him a promissory note therefor, payable on 11th September 1881. C. granted to B. the following letter of guarantee: "13th August 1881.—A. has asked me to say that I will see the £29 paid at the rate of £10 per month from this date, and I undertake that it will be so paid by him." A. having failed to pay the first instalment, B., without intimation to C., on 29th September protested the promissory note, and on 5th October A. was sequestrated. In an action by B. against C. for the amount of the debt, raised after the last instalment became due, it was held (1) that the letter imported an agreement that B. should not enforce payment from A. except at the rate of £10 per month, and (2) that B. had violated the agreement, and liberated C. from his obligation.

A cautioner will also be discharged if, at entering into the obligation, the creditor misrepresents facts or circumstances which might be important for the cautioner to know. An example of this will be found in the case of *Falconer* v. *Westland*, 1863, 1 Macph. 704. Several other cases of a similar description are adverted to when treating of guarantees.

If the creditor grants time to the principal debtor, the cautioners will likewise be discharged. But the time must be given by *positive* contract. Mere inactivity or forbearance on the part of the creditor will not discharge the cautioner. The creditor is not bound to proceed with diligence against the principal debtor.

Prescription.—The septennial limitation was introduced by the Act 1695, c. 5, which provides—"That no man binding and engaging for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond; but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution." Further, cautioners entitled to the benefit of the Act are declared to be "parties bound for another, either as express cautioners or as principal or co-principal, provided there be either a clause of relief

in the bond, or a bond of relief apart, intimated personally to the creditor at his receiving the bond." Thus, in order to have the benefit of the Act, a cautioner must either (1) appear *ex facie* of the bond as express cautioner; or (2) have a clause of relief in the bond; (3) have a separate bond of relief, granted by the principal debtor, duly intimated to the creditor not later than such time as he receives the principal obligation. All legal diligence done within the seven years shall continue the obligation. Practically, no evidence of any kind will suffice to bind the cautioner, in cases where the Act applies, after the seven years. The Act operates immediate and total extinction of the obligation. Even a payment of interest by a cautioner, or a recognition otherwise by him of his obligation, after the seven years was held to have been made in error, and did not set up the obligation, but was re-demandable by the cautioner,—*Stocks* v. *M'Lagan*, 1890, 17 R. 1122. A party bound as "cautioner, surety, and *full debtor*," has been found to have the benefit of the Act, and that without a clause or bond of relief, and entitled to repayment of a sum paid by him after the seven years,—*Yuill* v. *Scott*, 1827, 6 S. 137 (affirmed on appeal, 1831, 5 W. & S. 436). Nothing short of an independent contract on the part of the cautioner, not to take advantage of the Act, will set up the obligation after the lapse of the seven years,—*Anderson's Trustees* v. *M'Gregor's Executors*, 1893, 21 R. 7.

The Act does not apply to the following:—

(1.) Obligations to pay interest for money lent, for payments becoming due after the seven years.

(2.) Judicial cautioners.

(3.) Cautioners for the faithful discharge of an office.

(4.) Cautioners in an obligation *ad factum prestandum*.

(5.) Bonds of corroboration.

(6.) Cautioners for a composition in bankruptcy.

(7.) The claim of one cautioner against another, which is not cut off by the Act, but endures for forty years.

(See in this connection the case of *Molleson* v. *Hutchison*, 1892, 19 R. 581.)

(8.) In the case of *Alexander* v. *Badenoch*, 1843, 6 D. 322, an opinion was given by a majority of the Judges that the Act did not apply to parties bound expressly as cautioners in a cash-account bond. The Act relates to sums of liquid amount, while a cash-credit, in its nature, contemplates a future series of transactions and fluctuating amounts. The Court probably based their opinion in the above case on this principle. Banks, however, invariably frame and take cash-credit bonds so as to exclude the Act of 1695, by binding the cautioners as co-principals and full debtors.

Cautionary Obligations to or for a Firm.—By the 18th section of the Partnership Act, 1890, it is enacted that "a continuing guaranty or cautionary obligation given either to a *firm* or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given." This practically re-enacts section 7 of the Mercantile Law Amendment Act of 1856.

It will be observed that the enactment applies only to firms *to* or *for* which cautionary obligations have been granted, and does not embrace firms *by* which these obligations have been granted; so that these two classes are affected by different rules of law.

From the plain terms of the enactment it appears that a cautionary obligation to or for a firm will not be binding, as to future transactions, on the granter after any change shall have taken place in the partnership of the firm, even though such change has not been intimated to the holder of the obligation. To guard against such an imminent risk as this, it would be prudent in every such obligation to or for a firm to stipulate that it shall continue in force notwithstanding a change of partners. There is apparently little doubt that obligations to or for public companies, or joint stock or private companies, which

are held to act as permanent companies, would not be affected by a change of partners.

As cautionary obligations *by* a firm are not comprehended in the enactment above referred to, these fall to be regulated by the rules of common law. The question of chief importance for us to consider here is, what effect the dissolution of a company has upon a cautionary obligation granted by them.

The dissolution of a firm does not affect the responsibility of the partners for any transactions or obligation entered into previously. Even a partner who leaves a firm will be responsible for transactions entered into subsequently, unless the dissolution of the partnership be intimated to their creditors. A creditor dealing with a firm is entitled to rely on the credit of the partners as at the date of his obligation, until intimation of the dissolution of the partnership be sent to him.

A partnership may be dissolved by the partners voluntarily at any time. It is also dissolved, (*a*) if entered into for a fixed term, by the expiration of that term; (*b*) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking; (*c*) if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership. Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner,—Partnership Act, 1890, secs. 22 and 23. The effect of a change of the partners has already been noticed. The Court, on the application of a partner, may decree a dissolution in certain cases,—(see Act, sec. 35). As to what is sufficient intimation of the dissolution of a partnership, to free a retiring partner from future obligations by the firm, it is laid down that a notice in the *Gazette*, accompanied by advertisements in the newspapers, is *not* sufficient notice, unless a knowledge of these be brought home to all the creditors of the firm. The only safe course to free retiring partners from responsibility, is to send written notice to all the customers or creditors of the firm intimating the dissolution. It has been held that circulars put

into the post-office with a proper address is good intimation. A change in the name of the firm is good notice, if known to parties dealing with it.

As to notice to parties dealing with the firm for the first time after a change in the partnership, a notice in the Edinburgh *Gazette* is declared sufficient intimation to free retiring partners from responsibility to such parties.

It is advisable in all cautionary obligations, for or to a firm, to stipulate in the instrument that it shall remain binding on the granter notwithstanding the dissolution of the partnership or change of partners therein. The effect of this clause will be considered when treating of cash account bonds.

Before leaving this subject it may be noticed that cautionary obligations by a firm ought to be signed by all the partners, particularly if the transaction guaranteed is not within the ordinary line of business of the firm. The signature of the firm by one of the partners will bind all the others with reference to any transaction within the line of business of the partnership; but no partner can bind his copartners in any extraordinary act out of the usual course of business; and as the granting of a cautionary obligation for a third party is not in the usual course of a partnership business, it requires the signature of all the partners to make it effectual against the firm.

CHAPTER VIII.

GUARANTEES.

The word guarantee is usually applied to cautionary obligations *in re mercatoria*, and is defined by Professor Bell as an undertaking to be answerable for the payment of a debt, or for the price of goods, or for the balance arising in the course of dealings, or for the performance of an undertaking by another person.

Constitution.—By the Mercantile Law Amendment Act all guarantees must now be in writing. Mercantile guarantees are privileged documents, and do not require to be either tested or holograph. It is always a nice question to determine what guarantees are mercantile and what are not. Where there is any doubt on this point, it is advisable that they should be either holograph or tested. It has been decided that a guarantee for an overdraft on a bank account is not *in re mercatoria*. A guarantee by a company, holograph of the acting partner, was held binding although neither tested nor *in re mercatoria*,—see *Buchanan* v. *Dennistoun*, 1831, 9 S. 557, and 1835, 13 S. 841.

Informal Guarantees perfected Rei Interventu.—Guarantees, though not *in re mercatoria*, may be perfected *rei interventu*, a principle of law to be kept in view in dealing with imperfect obligations. The doctrine of *rei interventus* is grounded on the fact of the person otherwise imperfectly bound (*e.g.*, where the cautionary obligation is not holograph or tested, and the transaction is not *in re mercatoria*) having permitted the other party to proceed on his own obligation or agreement as if it were complete, and to perform acts referable to, or resulting from,

the agreement, which, by the refusal to execute the agreement, would prove detrimental to the person so misled or encouraged to proceed (Bell's Principles, sec. 26). This may be illustrated by a reference to the case of *Johnston* v. *Grant*, 1844, 6 D. 875, where it was held that although a letter of guarantee to a bank agent for an overdraft was not *in re mercatoria*, and neither tested nor holograph, it was binding in consequence of operations known to the granter having been permitted by him to proceed as if it had been a valid document,—see *Ballantyne* v. *Carter*, 1842, 4 D. 419; and *National Bank of Scotland, Limited*, v. *Campbell*, 1892, 19 R. 885. In the latter case, where an advance had been made under a guarantee on the faith of the cautioner's signature, he was held bound, although the witnesses to his signature did not see him subscribe, or hear him acknowledge his signature.

The terms of a guarantee ought to be distinct and intelligible as to what is undertaken, as to time, or number of transactions, &c., and all limitations expressed in it must be strictly attended to. Guarantees are limited to the parties to whom they are addressed. An exception to this, it is said, takes effect in the case of guarantees attached to bills; but the the question appears to be doubtful,—see *Sir William Forbes* v. *Macnab*, 1816, 19 F.C. 137. There is, of course, a certain risk in taking a letter of guarantee which is neither holograph nor attested, since the holder may be required to prove the genuineness of the signature, or that the document was written under the authority of the party whose signature it purports to bear,—*Wylie and Lochhead* v. *Hornsby*, 1889, 16 R. 907. In this case, the cautioner in an improbative obligation admitted that he signed a stamped blank paper, but disputed that he authorised the insertion of certain portions of the guarantee. The Court held that the *onus* of proving that the insertion of the disputed portions had been authorised by the cautioner, lay on the party founding on the deed. It has been held in England, that where the neglect to give notice of dishonour produced loss or prejudice to the granter of the guarantee, he is free

from his obligation, so that the prudent course, in the event of the dishonour of the bill, is at once to give notice to the guarantor.

Relief and Discharge.—A guarantor, if he pays up the full amount, is entitled to relief from the principal debtor. In the case of *Harvie's Trustees* v. *Bank of Scotland*, 1885, 12 R. 1141, it was held that the guarantor, though he had paid up the full extent of his liability, as that was not sufficient to extinguish the creditor's claim, was not entitled to rank in competition with the creditor in the bankrupt estate of the principal debtor.

The principles explained in the preceding chapter, applicable to the discharge of caution by giving time, surrendering securities, concealing important facts, or discharging co-obligants without the consent of the rest, or by neglect, hold also with reference to guarantees.

Guarantees do not prescribe in seven years under the Act 1695, c. 5,—*Wilson* v. *Tait*, 1840, 1 R. 137 (which distinguishes between guarantee and caution).

Guarantees Del Credere.—Under a guarantee of this kind an agent in this country undertakes, for additional consideration or commission, to free his foreign principal from all risk of loss through failure of the parties to whom the goods are sold.

CHAPTER IX.

CASH-CREDIT BOND.

The cash-credit was instituted by the Scotch banks at an early period of their history, and it has been an important means of fostering the trade of the country. It is thus described by Professor Bell:—"A cash account with a bank is a credit allowed to a person named, in virtue of which he may pass cheques on the bank, draw bills, and operate in all the various ways in which he might have operated if he had actually had money deposited in the bank. The loan is made as the money may be required. The repayment is by the replacing of money as funds come in. The debt is in perpetual fluctuation."

Form.—The bond proceeds on the narrative that the granters have obtained a credit with the bank of a specified sum, in name of the party for whose behoof the credit is to be opened, and they bind and oblige themselves and their heirs, &c., conjunctly and severally, to pay to the bank on demand all such sums, not exceeding the amount of the credit, as are or shall be due to the bank from the party using it, whether drawn out by him or for which he is liable, by any drafts, orders, bills, promissory notes, indorsements, &c., with interest. The bond provides that any account or certificate, signed by the cashier or accountant, or some other officer of the bank, shall ascertain, specify, and constitute the sums or balances of principal and interest to be due on the account, and shall warrant summary diligence on the bond, for which no suspension shall pass but on consignation only. Where the credit is for behoof of a company, or where a company are sureties, the bond specially provides that it shall be binding, notwithstanding any deaths,

retirements, substitutions, additions of partners, dissolution of copartnery, or change therein.

It is almost unnecessary to repeat here that the bond must be signed by all the parties, otherwise the sureties who have signed will be free; and that, where a company are sureties, the bond ought, not only to be signed by the firm, but by all the partners. The bond must be delivered. Where one of the co-obligants, having signed the deed, dies before delivery, the implied mandate to deliver falls, and the deed being in fact undelivered, his executors are not liable,—*Life Association of Scotland* v. *Douglas*, 1886, 13 R. 910.

Rights of the Sureties.—It will be observed, from the terms of the bond, that the character of the sureties as cautioners is suppressed, and that they are all bound as principal debtors. The bond, however, discloses on its face that the credit is given to only one of the granters, and the sureties are therefore entitled to the equitable rights of cautioners, except that they have no right to the benefits of discussion and division, and of the septennial limitation. In dealing, therefore, with the sureties for a cash account, the general rules of law applicable to cautionary obligations, before explained, require to be kept in view. If the bank does any act which will have the effect of prejudicing the rights of the sureties, such as discharging one of them without the consent of the others, or surrendering securities, or giving time by positive contract after a demand of payment has been made, the obligants will be discharged. An instance of discharging the sureties for a cash-account, by the bank liberating one of them without the others' consent, will be found in the case of the *British Linen Company* v. *Thomson*, 1853, 15 D. 314. On the account being paid up by the sureties, they are entitled to an assignation of all securities which the bank may have otherwise acquired from the principal debtor for that special account.

In the case of *Hamilton* v. *Watson*, in the House of Lords, 1845, 4 Bell, 67, an obligant on a cash-credit bond suspended

a charge on the ground that the bank did not disclose to him, before signing the bond, the fact that the party in whose favour the credit had been obtained stood indebted to them under a prior bond for a similar amount, and that the bank, on obtaining a draft, applied the sum of the new credit in payment of the old one, contrary to the intention of parties and the nature of the credit. The House of Lords held this plea irrelevant, and that the obligant was liable. It follows, therefore, from this decision, that in ordinary cases a bank is quite entitled, on obtaining a draft from the holder of a new credit, to apply the amount of it in payment of an old debt due to them. It must be kept in view, however, that there must be no misrepresentation on the part of the bank, otherwise the cautioner will not be bound. In the case of *Falconer* v. *Westland*, 1863, 1 Macph. 704, it was set forth in the bond, prepared by the law-agent for the bank, that the debtor was to receive the whole consideration for the obligation, whereas, in point of fact, part of the consideration was applied to discharge a prior debt due by him. This was held to free the cautioner.

Operations on the Account.—For every operation on the account there should be a regular and authentic voucher. The bank books are not evidence of a payment to a customer; and it has been decided that where the customer appeals to the bank books in evidence of the state of accounts, he is entitled to found upon the entries to his credit, while he is not bound by the entries on the other side. In the case of the *Commercial Bank* v. *Rhind*, 1860, 22 D. (H.L.) 2, it was decided by the House of Lords, that where a sum was by mistake entered twice to the credit of a customer in his pass-book, the pass-book only afforded *prima facie* evidence of the payment, liable to be rebutted; but that the *onus* of proving the entry to be a mistake lay upon the bank. Entries in the pass-book of sums paid into the bank are *prima facie* evidence against the bank that the money has been paid in, but they are not conclusive evidence,—*Cowper's Trustees* v. *National Bank*, 1889, 16 R.

412. The necessity for a voucher for every operation is shown by the case of *Paterson*, 1844, 6 D. 987, where it was held that a balance due by the holder of a credit transferred to the debit of the cash account, without a draft or authority from the holder, was an unauthorised and illegal operation, and consequently that the sureties were not liable for such balances.

The bond is so framed as to allow the bank to carry to the debit of the account overdue bills, &c. of the holder. It was at one time doubted whether, if such bills were not carried into the account at the time they were discounted, they could afterwards be brought in so as to make the sureties for the credit liable for them. This point was decided in favour of the bank in the case of *Liddell* v. *Sir William Forbes and Co.*, July 1820.

Overdrafts.—The sureties for a cash account are not liable for any sums overdrawn beyond the extent of the credit; and, as will be afterwards seen, interest which has been accumulated in the books of the bank with the principal falls to be treated as *principal*, in the same way as if the holder of the account had granted a draft for it. Questions with sureties have arisen, whether sums paid into the credit of an overdrawn account fall to be applied by the bank in reduction of the sum for which the sureties are bound, or in payment of the overdraft. The general rule of law is that a creditor, in distinct transactions, is entitled to apply sums received from his debtor in liquidation of whatever debt he pleases; but there is no room for the application of this principle to a current account, where all the sums paid in form one blended fund, the parts of which have no distinct existence. In a well-known case, *Devaynes* v. *Noble*, 30th July 1816, the Master of the Rolls thus stated the law as to the appropriation of sums paid into a bank account:—"In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first

item on the debit side that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts-current are settled, and particularly cash-accounts. Where there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head instead of the foot of it." Two important results follow from the application of the above principle to cash-accounts.

1. Where a bill has been debited to the account, and sums are subsequently paid in equal in amount to the balance due on the credit as at the date of debiting the bill, the bill will be held as paid, notwithstanding that a balance due to the bank afterwards arises on the account. The bank, therefore, could not recover the bill from any of the obligants on it. This point was determined in the case of *Lang* v. *Brown*, 1859, 22 D. 113.

2. Where from any cause the liability of the sureties ceases as at a particular date, and where the balance then due is afterwards extinguished by subsequent payments into the account, the bank will have no claim against the sureties for any balance which may afterwards arise by operations on the accounts. In illustration of this, reference may be made to the case of *Christie* v. *The Royal Bank*, 6th April 1841 (Ross's Leading Cases). There Robert Allan and Son obtained from the bank in 1832 a credit of £20,000, in security of which Thomas Allan, one of the partners, conveyed to the bank the estate of Lauriston. He died in the following year, when the credit was fully drawn out. Thomas Allan's son was assumed as a partner of the company, which continued to carry on business under the same firm. The new company obtained another advance of £22,000 from the bank, which was paid into the former account, on which operations continued to be made. The firm became

bankrupt in 1834, when they were debtors to the bank in £42,000, with interest. The trustees on Thomas Allan's individual estate raised a reduction of the security given by him in the first bond, on the ground that it was granted by him for a credit to the company, of which he himself was a partner; that this company, being dissolved by his death, of which the bank, of course, had a perfect knowledge, and the balance then due (when his liability terminated) being subsequently paid by the crediting of the £22,000, his estate was liberated from the obligation under the bond. The House of Lords, affirming the judgment of the Court of Session, gave effect to this view.

Accumulation of Interest with Principal.—It has been the invariable practice of banks at the close of the financial year to accumulate the interest arising on a cash or current account with the principal sum; and to carry forward the accumulated amount to the next account on which interest was charged or allowed as the case might be. In claiming payment from the sureties for a cash account overdrawn, the general practice of banks was to charge interest, accumulated annually, on the principal sum in the bond from the date at which the overdraft commenced, besides interest on the fluctuating balance within the credit from the previous annual balance. This practice, however, was expressly ignored by the Court in the important decision of *Reddie* v. *Williamson*, 1863, 1 Macph. 228. In this case it was decided that the interest, when accumulated with the principal sum, became *principal*, just as if a draft had been given for the amount, and that the bank could not afterwards separate the interest thus accumulated, as in a question with sureties. If the amount by the accumulation of interest is swelled beyond the limits of the bond, the sureties will not be liable for the excess, because then it ranks as an overdraft. The practical result, therefore, is, that sureties for a cash account overdrawn are only liable for the sum in the bond and interest thereon from the last date of accumulation. In pronouncing judgment, the Lord Justice-Clerk remarked that if

the bank, instead of demanding the interest from the co-obligants due at the end of the year, choose, in concert with the obligant who is authorised to operate on the account, to avail themselves of their privilege of accumulating the interest, without any communication with the other obligants, they are dealing with the account, as far as these other obligants are concerned, in precisely the same way as if the leading obligant, instead of paying the interest, had given the bank a cheque for the amount with which the bank extinguished the interest, and then placed the amount of the cheque to the debit of the cash-account as an ordinary draft. The moment that interest is converted into principal, the amount of it must be reckoned as part of the drafts on the credit, or beyond the credit, for which the party operating on the account will be liable as principal in any event, but for which the other co-obligants cannot be held liable, if it swells the debit side of the account beyond the limits of the cash-credit. Observations were made upon this case of *Reddie* in the subsequent case of *Gilmour* v. *The Bank of Scotland*, 1880, 7 R. 734, where it was held that, just as the bank are not entitled to go further back than the last balance preceding the termination of the account, to calculate the interest due, so on the other hand they *are* entitled to go back to that last balance and recover interest on the account as at that date. The First Division, in the recent case of the *Commercial Bank of Scotland* v. *Pattison's Trustees*, 1891, 18 R. 476, confirmed the principles laid down in *Reddie*.

The liability of the debtor continues, notwithstanding the bond, for the full sum at debit of the account.

Cash Accounts in name of a Company, and the effect of Changes in the Partners.—It is the invariable practice now to introduce into bonds of credit a stipulation to the effect that in the event of any change in the copartnery of a firm having a credit with the bank, the obligation is to continue on the part of the cautioners, in view of the Partnership Act of 1890, section 18 (see page 102), which supersedes a somewhat similar

enactment contained in section 7 of the Mercantile Law Amendment Act, 1856. The change in the constitution of a firm may be occasioned by the death or retirement of one of the partners, or by the assumption of new partners.

Difficulties may, however, arise in regard to the obligation of the new company itself. If the new company took over the whole stock and assets of the old, the former would be liable for the business debts of the latter. In the case of *Miller* v. *Thorburn*, 1861, 23 D. 359, the Lord Justice-Clerk laid down the general principle that, "where a new firm takes over the whole stock and business of a going concern, it is held also to take over the whole liabilities." Where a bank restricts the original amount of a cash-credit bond, while the original agreement remains, and then advances sums beyond the credit, the bank can retain all securities in its possession against the whole obligations of the parties, even where such securities have been avowedly placed with it to cover the amount under the bond, as restricted.—*Alston's Trustee* v. *Royal Bank*, 1893, 20 R. 887.

It frequently happens in practice that a company and its partners bind themselves *as sureties* for a cash account in name of another party. The effect of dissolution, in such circumstances, appears to be that the partnership and the partners continue liable for future advances, and that the only way by which they can bring their liability to an end is to send notice of recall. To send a notice of the dissolution merely, is not sufficient to revoke the obligation as to future advances.—See *Kemp* v. *Shaw*, 1824, 3 S. 104.

It is, however, expedient to have the bond renewed or corroborated on the dissolution of a firm bound as a surety.

Termination of the Bond.—The death of the person for whose benefit the credit exists brings the credit to an end; otherwise it subsists till it is put an end to by the sureties intimating to the bank their withdrawal from the obligation. This they may do at any time, and thus end their responsibility as regards future advances, provided their withdrawal be not

inconsistent with the terms of the bond. The bond does not fall by the death of one or more of the sureties, but continues binding upon their representatives, as to future advances, until they give notice to the bank that they withdraw from the obligation. The soundness of this doctrine has been frequently questioned, but it is now conclusively settled by the case of *The British Linen Company* v. *Menteith*, 1858, 20 D. 557. In this case the credit was operated on for several years after the death of the co-obligants. The bank did not intimate the existence of the bond to their representatives till after the death and insolvency of the party in whose favour the credit was opened. The Court held, that as the representatives had not given notice to terminate their liability, the bank was entitled to recover all advances made before or subsequent to the death of the co-obligants. At the same time, it is proper that the bank should give notice to the representatives of deceased obligants, especially when the legal representatives are merely trustees, because if, after lapse of six months, the trustees or executors divide the trust funds among the beneficiaries, in ignorance of the existence of any such cautionary obligation, no claim can be made against the executors or trustees personally.

In the case of *Johnston* v. *The Commercial Bank*, 1858, 20 D. 790, it was held that a bank is entitled to bring a cash account to a close before it has been operated on to the full extent, provided the bank does not act capriciously, and gives the party due notice of its intention to refuse further credit. See also *Parkinson*, 1889, 5 T.L.R. 562.

Diligence on the Bond.—The bond provides that a stated account certified by an officer of the bank shall ascertain and constitute the amount due on the credit, and shall warrant all necessary diligence against the granters. In virtue of this stipulation, and of the consent to registration for execution, the bond and certificate may be recorded and a charge given to the obligants on the extract. It is, however, not unusual to proceed by letters of horning on the bond and certificate, as some practi-

tioners have doubts (which are apparently groundless) whether the Personal Diligence Act is applicable to the case of a bond of credit; but the method first mentioned has been frequently adopted in practice without objection. The renunciation by the obligants of their right to suspend a charge, except on consignation, is not binding, being contrary to the principles of public law. It is perfectly open, therefore, to the obligants to challenge the accuracy of the account by way of suspension without consignation, but caution will, generally, be insisted on. In the account on which a charge is given, all sums due to the bank under the bond by drafts, bills, &c. may be included. Should any such engagements be still depending on bills in the circle at the time the charge is given, these may, if necessary, through non-payment, be brought into it,—*Alston's Trustee* v. *Royal Bank*, 1893, 20 R. 887.

Cash Account on Bills.—Advances are frequently made by banks on current accounts against bills deposited in security. Where the bills so deposited are trade bills, or where the drawer has given value to the acceptor, the bank, as an onerous holder, may recover from the obligants by summary diligence. But where no value has been given by the drawer, the bill being accepted merely for the purpose of obtaining advances from the bank, the security is frequently attended with disadvantage. Bills of this latter kind are merely cautionary obligations, and the obligants, who are not the proper debtors, are entitled to the rights and privileges of cautioners. The rules applicable to cautionary obligations have already been explained, but some of the disadvantages which have been found to attend bills deposited in security may be mentioned.

In the case of the *British Linen Company* v. *Thomson*, 1853, 15 D. 314, it was decided—1st, that the acceptors of a security bill for a cash account in name of the drawer were not liable, unless it was shown that there was a balance due to the bank, by the drawer at the maturity of the bill; and 2nd, that the bank having discharged one of the obligants on the security

bill, who became insolvent, by accepting a composition from him, without consent of the others, they were released from their obligation.

As to security bills granted by a company to a bank, which takes them in the knowledge that they are security bills, if a partner adhibit his firm's signature without the consent of the other partners the company will not be bound, he having no power to bind the company in a cautionary obligation, such not being in the line of the firm's business. Again, though the bill be signed by all the partners, it will not be binding on the new company for anything done under it, after a change shall have taken place in the partners comprising the firm, unless an intention that it should be thus binding be established by agreement, express or implied. But where a new firm, formed by the assumption of a new partner, takes over the business as a going concern, there being no arrangement for winding up the old company's affairs or for accounting, it may more readily be presumed to become liable for the old firm debts also.

We shall afterwards, under the head of Banker's Lien, have occasion to consider the rules of law applicable to bills coming into the hands of a banker in the ordinary course of business.

Cash Accounts on Minutes passed by Public Bodies.—Cash accounts to public bodies based upon a minute passed at a meeting of the body, or of its managers, are very common in practice; but in such cases the bank looks chiefly to the responsibility and honour of the borrowers. A minute is not a legal way of constituting a debt; but, assuming that the body passing the minute has full power under its constitution to borrow money, and that the money so borrowed is applied for its benefit, the minute, with the cheques upon the account, would form a good ground of action against the borrowers. It is to be observed that the managers or directors of public bodies thus borrowing, are not personally liable for the debt, unless they specially bind themselves for it; and the bank can, therefore, look only to the funds and property of the institution for repayment.

In arranging a credit of this kind, the matter principally to be kept in view is, whether the credit is intended to be a standing credit or for a temporary purpose merely. County Councils (under Act 52 and 53 Vict. c. 50, 1889), for example, frequently obtain a credit on the security of assessments for the current year; and in a case of this kind the minute ought to be renewed annually. The minute ought distinctly to state the purpose for which the credit is to be applied, and the assessment which is to form the basis of security; and should contain a clause binding the commissioners to make and levy the assessments, and pay them over to the bank towards reduction of the credit. It is of great practical importance that the minute should explicitly state who is to make the operations on the account.

A public body which is constituted by, or works under an Act of Parliament, generally has its powers for borrowing money defined in the Act; and if the loan is to be made under the Act, its provisions require to be carefully complied with, and the security prepared in the statutory form, otherwise there might be risk of loss in the event of the debt being afterwards repudiated. When a credit to a public body so constituted rests upon the minute of a meeting, the security is of course not under the Act, and the bank simply relies upon the good faith of those with whom they contract. The terms of these minutes vary according to the object for which the credit is wanted, and the nature of the security proposed.

It may be here observed, that Parish Councils have power to borrow for lengthened periods, for purposes set forth in the Local Government (Scotland) Act, 1894, to be repaid as therein directed; but for necessary current expenditure they may borrow only to the extent of one-half of the assessment which may be outstanding for the current year, and no new debt can be legally contracted until the prior debt has been repaid.

School Boards are not entitled to borrow money by means of an overdraft. See *The Queen* v. *Sir Charles Reed*, L.R. 5 Q.B.D. 483; but this decision does not forbid a School Board overdrawing its account with the bank in the course of

its ordinary transactions, and even if the sum be borrowed by way of an overdraft, the School Board will be bound to repay the amount of the overdraft out of the school rate, provided that the sum borrowed has been applied for proper School Board purposes. (It was so held in the case of *The Commercial Bank* v. *The Lady Parish School Board* by Lord Rutherfurd Clark, 1878, not reported.) By the Education Act, 1872, School Boards have power to borrow money for building purposes, under certain conditions as to repayment.

CHAPTER X.

HERITABLE AND OTHER SECURITIES.

1. Bond of Credit and Disposition in Security.—Previous to the year 1814 cash-accounts were granted on personal security only, for, as the law then stood, a disposition of heritage in security was of no force as to any debts contracted after the security was granted.—(See Act 1696, c. 5.) By the Bankrupt Act of that year, 54 Geo. III., c. 137, on the narrative that it would tend not only to the benefit of commerce, but also of agriculture and manufactures, it was made lawful "for any person or persons possessed of lands or other heritable subjects to pledge the same in security of any sums paid, or balance arising or which may arise upon cash accounts or credits: provided always that the principal and interest which may become due upon the said cash account or credit shall be limited to a certain definite sum, to be specified in the security; the said definite sum not exceeding the amount of the principal sum and three years' interest thereon at the rate of five per centum." —(See *Forbes and Welsh* v. *Forbes*, 1894, 21 R. 630.) On the repeal of the above Statute this provision was re-enacted by the 19 and 20 Vict., c. 91.—(See also 31 and 32 Vict., c. 101, secs. 3 and 134.)

The form of the bond now in use is the personal bond of credit and disposition in security combined, containing a provision, in terms of the enactment, limiting the security over the heritages to the principal sum of the credit and three years' interest at five per cent. Though the security as regards the heritages is thus limited, the bank may, under the personal obligation, recover from the obligants any greater sum that may be due on the account.

If the heritages are conveyed in security by a party other than the holder of the credit, the party to whom the heritages belong, though not personally bound for the credit, is, as regards the security given by him, entitled to certain rights and privileges of a cautioner, so that, in dealing with such securities, the rules of cautionary obligations require to be kept in view, as an infringement of these would have the effect of discharging the security.

The personal obligation in the bond is enforced in the same way as the moveable bond ; and the heritages may be sold after a notarial intimation has been given to the debtor to pay the sum due within three months after the date of demand, and after the heritages have been advertised for sale, for six weeks, in an Edinburgh or Glasgow and a local newspaper. The *full* period of six weeks must elapse between the date of first advertisement and the date of exposure,—*Ferguson* v. *Rodger*, 1895, 22 R. 643.

The heritages being conveyed in security of a specified sum only, the bank, as in a question with other creditors, is not entitled to apply, in the payment of other debts, any surplus of the security that may remain after satisfying the particular debt for which it was given. See, under INHIBITION, as to the effect of inhibition used against the debtor in a cash-credit bond.

2. **Bond and Disposition in Security.**—The distinctive character of the bond is, that it is a security for a sum instantly or previously advanced on loan, repayable at a specified term, and bearing interest payable half-yearly during the non-payment. The bond does not secure any sums advanced by the creditor after the date of infeftment thereon. Nor does it, like the heritable bond for a cash-account, admit of sums paid in to the credit of the advance being again drawn out. All sums paid in to the credit of the advance extinguish the security to the extent of the sum so paid in, and the security subsists only for the balance. (For the form and import of a bond and disposition in security, see 31 and 32 Vict. c. 101, secs. 118 and 119.)

In practice, however, it is not uncommon for bankers so to deal with the bond as to make it an indirect general security to the extent of the sum contained in it. The transaction is accomplished in this way: the whole sum in the bond is paid over to the granter, usually on his cheque, and entered as a loan in the books of the bank in an account in his name, to remain inoperative; after which the granter pays in the sum advanced, or whatever portion of it he may not require at the time, to the credit of a deposit-account in his own name, on which operations may be made according to arrangement. The banker has then a right of lien over the sum at the credit of the deposit-account, out of which he is entitled to payment of any bills or other obligations which he may hold binding on the depositor. The loan may then be liquidated by means of the security given in the bond. In the case of *Bell's Trustees* v. *Bell*, 1884, 12 R. 85, a bond and disposition in security was granted to a bank as security for an obligation to repay a sum of £10,000, set forth as borrowed by the granter, "and of the sums that may be disbursed" by the bank for repairs, insurances, &c., on the subjects conveyed. No money was advanced by the bank at the date of the bond, which was used as a cash-credit bond. On the death of the granter the value of the subjects was found less than the sum due to the bank. It was held that, whether the bond was or was not struck at by the Act 1696, c. 5, it was binding on the granter's representatives, and that the granter's intention to create a heritable debt was clear, and, therefore, that the other heritable estate of the granter was liable for the balance due under the bond to the relief of the executor. A person's heirs are personally liable for heritable securities, but only to the extent they benefit by the succession. A general disponee succeeding to a property, burdened with a bond and disposition in security, has been held not liable beyond the value of his succession,—*Welch's Executors*, Petitioners, 1896, 23 R. 772.

A real security cannot be given for an indefinite sum of money. Thus a disposition in security of the damage to be

sustained by mineral workings is bad,—*Smith Sligo* v. *Dunlop and Co.*, 1885, 12 R. 907.

The creditor in a heritable security, in order to enforce payment of the sum due to him, may, by an action of maills and duties, enter into possession of the subjects and draw the rents. He may also, if there be any moveable articles in the security subjects, raise an action of poinding of the ground, under which these articles may be sold, and the proceeds applied in payment of his debt.

The holders of bonds are entitled to priority according to the date at which the instrument is recorded, and not according to the date of the instrument.

Until 1894, it was doubtful whether a debtor proprietor in possession could be removed by a heritable creditor; but, under the Heritable Securities Act of that year, provided the debtor has made default in the punctual payment of the interest due under the security, or if the principal is unpaid, after formal requisition, he is deemed to be in possession without a title, and may be summarily ejected (sec. 5). Provision is also made for security-holders becoming absolute proprietors of the security subjects, provided they have exposed the property to public sale at the total sum due under the bond, or at any less sum (sec. 8). Under the same Act, a creditor in possession of property disponed in security may let the same for a period not exceeding seven years (sec. 6); or the Sheriff may, on application by a creditor, grant power to lease the security subjects for not more than twenty-one years for heritable property in general, and thirty-one years for minerals (sec. 7).

3. Securities over Leasehold Subjects.—At common law, no real right in a lease can be acquired by an assignee, unless and until he enters into possession. Thus where a joint stock company had assigned leases of minerals, of which they were tenants, in security of sums advanced on debentures, it was held that the debenture-holders who had intimated the assignations to the landlord, but had taken no steps to enter into possession,

had no preference as regarded the leasehold property over the ordinary trade creditors of the company,—*Clark and Co.* v. *West Calder Oil Co.*, 1882, 9 R. 1017. Until the passing of the Registration of Leases (Scotland) Act, 1857, therefore, no effectual security could be constituted over a lease unless the creditor took possession. The main object of this Act was to constitute a recorded bond and assignation in security over a lease an effectual security, and to obviate the necessity of the creditor entering into possession. The 4th section makes it lawful for the party in right of a probative lease of thirty-one years and upwards, recorded in terms of the Act, to assign the same in security of borrowed money, or in security of cash-credits, or other legal debt or obligation; and provides that the recording of the assignation shall complete the right thereunder, and that such assignation in security, so recorded, shall constitute a real security over such lease. The Act provides a form of bond and assignation in security (sch. B), which differs from a bond over heritable property in respect that there is an assignation of the lease, instead of a disposition of lands, in security; a form of assignation of securities over leases (sch. D); and also a form of discharge (sch. H). After six months' default of payment of the capital sum, &c., the creditor may apply to the Sheriff for a warrant to enter into possession, to uplift the rents from any sub-tenants, and to sublet. Until the creditor enters into possession he is not liable to the landlord for the rent (sec. 6). The holder of a security over a long lease has not the right of poinding the ground, his real security being in the lease only,—*Luke* v. *Wallace and Others*, 1896, 23 R. 634.

4. Mortgages on Ships.—The Merchant Shipping Act, 1894, 57 and 58 Vict. c. 60, mainly codifies the law relating to British ships. The Act declares, that the property in a ship shall be divided into sixty-four shares, and that not more than sixty-four individuals can be registered as owners of a ship; but five persons or fewer can own a ship, or any share or shares

therein (sec. 5). A share may not be subdivided. A corporation may be registered as owner of a ship or any share therein. A private firm, on the other hand, cannot be registered in the firm's name, but the ship or share may be registered in the name of one or more of the partners for behoof of the firm. The register cannot take notice of any trust (sec. 56).

These securities have never been in favour with bankers, in consequence of the difficulties in the way of making them available, and of the risks involved. They have, however, been put on an improved footing by the above Act, both as to their constitution and as to the responsibilities attaching to mortgagees.

The Act (secs. 31 to 38) provides, by a very simple and effectual form (sch. 1, B), for a registered ship or share therein being made a security (1) for principal and interest of a sum instantly loaned, or (2) for an advance on an account-current. The instrument must be in the form annexed to the Act, and must be registered in the register book of the port at which the ship is registered. The registrar is directed by the Act to record mortgages in the order in which they are produced to him, and to notify on the instrument the date and hour of registration.

If there is more than one mortgage registered of the same ship, the mortgages are entitled to priority according to the date of *registration*, and not according to the date of the instrument (sec. 33).

A mortgagee is not deemed to be the owner of the ship or share, nor does the mortgagor cease to be the owner, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt (sec. 34).

Every mortgagee has power absolutely to dispose of the ship, or of any share in respect of which he is registered, and to give effectual receipts for the purchase-money; but no subsequent mortgagee has power to sell, except with the concurrence of every prior mortgagee, or under the order of a competent court (sec. 35)

A mortgage is not affected by any act of bankruptcy by the mortgagor after the date of registration; and it is preferred to any right, claim, or interest which may belong to the assignees of such bankrupt (sec. 36). In the case of *Anderson* v. *Western Bank*, 1859, 21 D. 230, this provision was held not to bar a trustee for creditors challenging a mortgage, as a voluntary security granted for a debt, within sixty days of bankruptcy.

Mortgages over ships are exempt from stamp duty.

Where it is desired to transfer the property in a registered ship or share therein, a bill of sale, which is exempt from stamp duty, in the form appended to the Act of 1894, must be used. One witness is sufficient. Bills of sale are registered in the order of their presentment; but the Act does not say (as in the case of mortgages) that a second purchaser who has his title registered before a prior purchaser, thereby secures a better title than the first buyer. The holder of an unregistered bill of sale is preferable to a trustee of the seller who becomes bankrupt,—*Watson* v. *Duncan*, 1879, 6 R. 1247. Bills of sale (of ships) taken as securities are to be avoided, for the bank thereby become owners, with all the serious responsibilities incident thereto, such as questions with shippers, collisions, &c.

Bottomry and Respondentia.—Under these contracts, with which bankers in general have little concern, money is lent to the owners of ship or cargo in this country; or to the master when the ship is abroad, provided the money be indispensable for completing the voyage and not otherwise obtainable, and that he is not able to communicate with the owners. The lender's claim under the former is on the ship and freight, and by the second (in general) the goods are hypothecated to him. These bonds, if by the master, are preferred in the inverse order to that in which they are granted; if by the owners of the vessel, they are preferred according to their dates.

CHAPTER XI.

SECURITIES FOR GENERAL ADVANCES AND CONTRACT OF PLEDGE.

A SECURITY which is intended to cover all advances, whether made at the time or subsequently, may be constituted by an *ex facie* absolute conveyance or transference of the property. The effect of a security so constituted is to vest the holder with an absolute right of property, qualified by a personal obligation only to restore the subject on payment of all advances made to the debtor by the holder of the security, or to account for the proceeds, in case of a sale. The subject of such securities may be either heritage or moveables.

1. **General Security over Heritages.**—This security is constituted by an absolute disposition in favour of the creditor, recorded in the appropriate Register of Sasines. The conveyance, however, is generally qualified by a back bond or letter binding the creditor to reconvey the subjects on payment of all advances, thus disclosing the true purpose of the disposition. It is settled that though the back-bond should bind the creditor to reconvey on being paid a sum specified in it, yet while the back-bond remains unrecorded the creditor is not bound to reconvey till he has been repaid any further sums that may have been advanced by him afterwards on the faith of the security. But on the back-bond being recorded in the Register of Sasines, or produced in any judicial proceedings, the security will be restricted to sums advanced previous to the date of its being so recorded or produced, and this should be carefully kept in view. Another important restriction of the security is exemplified in the case of *The Union Bank of Scotland* v. *The National Bank of Scotland*,

1886, 14 R. (H.L.) 1. A bank held a recorded absolute disposition granted by A. of certain subjects which by back-letter it agreed to hold "in security, and until full and fixed payment of all sums of money now due, or which may hereafter become due." The back-letter was not recorded. A. afterwards, for onerous considerations, granted to another bank a deed by which she disponed her whole right and interest and right of reversion in the subjects. Intimation of the assignation was made to the first bank. Thereafter advances were made to A. by both banks. In a competition between the two banks it was held, that in a question between the two banks the first bank's security was limited to advances made prior to the date when the assignation was intimated. Lord Watson thus explained the legal position of the parties:—"As regards third parties who transact with him on the faith of the public records, the powers of the disponee are not affected by the private contract (*i.e.*, the back-bond) and he can sell or burden the estate, and can give a valid title to the purchaser or incumbrancer, although the creation of these rights should be in direct violation of the terms of the back-letter. But in a question with the disponee himself, or with persons who through him have acquired an interest in the estate or in the personal contract, the disponee is affected by the back-letter, and is treated as the holder of a mere security. In all such cases, the rights of parties must be determined, not according to the form of the disponee's title, but according to the substance of the transaction."

The usual practice in taking a security by way of absolute disposition and back-letter is to stamp the disposition with a general deed stamp, viz., 10s. (since 1871), and the back-letter with a mortgage stamp corresponding to the amount intended to be secured. But the disposition may be stamped with the latter stamp, and the back-letter with the former.

While a security constituted by way of absolute disposition gives to the creditor many advantages, there are, at the same time, certain disadvantages which ought to be kept in view in entering into a transaction of this kind. The holder cannot

poind the moveables on the ground for payment of his debt and interest, even although the back-bond has been recorded, which proves that his right is one in security,—*Scottish Heritable Securities Company* v. *Allan and Others*, 1876, 3 R. 333. This is a diligence which is competent to a proper heritable creditor only; but the creditor in a security constituted by absolute conveyance, being nominally proprietor of the subjects, loses the benefit of securing the moveables towards payment of his debt. Nor has the holder of an absolute conveyance all the privileges of a proprietor, where the real owner continues in possession of the subjects. He cannot sequestrate the furniture or other moveables in the premises as for rent. Although the holder of the *ex facie* absolute conveyance gives a lease to the real owner, it will not entitle the creditor to petition for sequestration of the moveables in the event of the nominal rent falling into arrear, because there is no real lease,—*Heritable Securities Investment Association, Limited*, v. *Wingate and Co.'s Trustee*, 1880, 7 R. 1094. The proper remedy is an action of declarator and removal. The holder of an absolute disposition, even when the back-bond is recorded, appears to have an absolute power of sale, either by public roup or private bargain, unless he has barred himself in the bond from such,—see *Duncan* v. *Mitchell and Co.*, 1893, 21 R. 37. It will nevertheless be advisable to insert in the back-letter an express power of sale.

The opinion has been expressed by Lord Kinnear, in a case where an action was raised against the disponee concluding for implement of certain obligations alleged to be contained in his title, that the recording of the back-bond and the reconveyance of the subjects to the debtor, and registration of the reconveyance, operated a divestiture of the feudal title, and freed the absolute disponee from liability for such obligations,—*Marshall's Trustee* v. *Macneil and Co.*, 1888, 15 R. 762.

It may be proper in this place to advert to the effect of a security over machinery in public works, a species of security occasionally held by banks against advances.

An absolute disposition of public works, though purporting to convey in general terms all the machinery, heritable or moveable, will give right only to the machinery so far as heritable, unless the creditor takes possession, either on his own account, or another does so in his behalf. It is a difficult matter to say what is heritable and what is moveable machinery; the rule for determining questions of this kind is the same between whatever parties they are raised, except as between landlord and tenant in regard to what are called trade fixtures.

The rule is that machinery or fixtures built into the edifice, or immoveably fixed by their own weight to it, if they cannot be removed without destroying the value of the heritable subject, or of the thing itself, are heritable, and pass with a conveyance of the lands. The application of this rule, however, is often a matter of great difficuly in determining what parts of the machinery are accessory to the building. The true criterion seems to be the intention with which the article was built in, or placed in an immoveable position. If the intention was to enhance the value of or for the better enjoyment of the heritage, it is heritable. If the intention was for the better enjoyment of the thing itself, it is moveable. Loose, moveable articles, which have no value apart from the heritable subjects, such as the key of a door, or loose parts of machinery, which form an integral part of the whole, have been held to be "constructive" fixtures, and heritable. In a question between landlord and tenant, it would seem that trade fixtures are in all cases moveable, if they can be removed *in specie*, so as to be reinstated *in specie*.

By the law of Scotland a valid pledge over moveable articles can only be constituted by actual delivery of the articles to the creditor, and the security expires with the loss of possession. Yet it may be attempted to carry through the transaction in the form of an absolute sale. Thus, by the Sale of Goods Act, 1893, if an intention to that effect be expressed in a contract of sale, the property in specific goods thereupon passes to the buyer. The Act, however, expressly excepts from this provision any contract of sale which is intended to operate by way of

pledge or other security. It is necessary, therefore, to attend to the law relating to the passing of such property before the Act, in order to ascertain how a valid security can be constituted under an *ex facie* absolute contract of sale. The rule before 1894 was, as embodied in the maxim, "*traditionibus non nudis pactis transferunter rerum dominia*," that delivery was necessary to pass the property. Two kinds of delivery were, however, admitted — (1) actual, as where the buyer got actual possession or control of the article; or (2) constructive, either where the goods, being in the hands of a third person, such third person acknowledged that he held them for the buyer, or where the goods still remained in the seller's hands, but an additional contract was entered into between himself and the buyer, which involved the fact that the seller was still to continue in possession,—as, for example, if furniture were sold under an absolute disposition, and hired back by the purchaser to the seller. Thus, in order to constitute a valid security over articles which remain in the seller's possession, it is still necessary to take an absolute disposition, and operate constructive delivery in this way. Such a transaction has been held to constitute a valid security in the following cases before the Act of 1893, viz.—*Duncanson* v. *Jefferis' Trustee*, 1881, 5 R. 863; *Hogart* v. *Smart's Trustee*, 1882, 9 R. 964.

2. Assignation of Incorporeal Rights.—Incorporeal rights, such as bonds for borrowed money, life policies, shares in a public company, a vested interest in a succession, and the like, may be transferred as a general security for advances. This is done by an assignation, transferring the right to the creditor. The assignee's right is completed by intimation of the transference being made to the debtor, or holder of the fund transferred. The date of intimation, and not the date of transfer, regulates questions of priority,—*Campbell's Trustees* v. *Whyte*, 1884, 11 R. 1078. The transfer of moveable property has been simplified by the Transmission of Moveable Property (Scotland) Act, 1862, and the Policies of Assurance Act, 1867. In the

schedules to the former Act there is given the form of an assignation of the right to be transferred. The Act also provides two modes in which intimation of assignation may be given: (1.) By a notary delivering a copy of the assignation, or such parts of it as respect the subject assigned, certified as correct, to the person to whom intimation is requisite personally, or by leaving it at his dwelling-house in presence of two witnesses. Evidence of the intimation is preserved by a notarial certificate, indorsed on the assignation in the form prescribed by the Act. (2.) By the holder of the assignation transmitting through the post a copy, certified as correct, to the party to whom intimation is to be made; and a letter acknowledging receipt of such copy is sufficient evidence of the intimation. The old modes of intimation, however, are not abolished; and the method generally adopted is, to hand to the holder of the right transferred a copy of the assignation, and get him to indorse on the principal an acknowledgment of intimation, holograph or tested. The object of intimation is to impose on the debtor evidence of the transfer, so as to stop him from paying to his original creditor, also to complete a preferable title to the debt. Intimation may be effected by other methods equivalent to intimation; as, for example, by the raising of an action in which the assignation is founded on, or by the production of it in a process to which the debtor is a party; by the debtor's written engagement to pay to the assignee; or by intimation by letter to the debtor or his agent, with an answer,—*Wallace* v. *Davies*, 1853, 15 D. 688. Payment of interest, or part principal, to the assignee is also equivalent to acknowledgment of intimation. When the debtor is a party to the deed intimation is unnecessary.

Intimation to one of several debtors in a bond, and to a factor, where a memorandum was entered in the books of the principal, has been held sufficient. Intimation to the managers or clerks of a trading company, entered in the books of the company, is sufficient. In the case of companies incorporated under the Companies Acts, any summons, notice, order, or other document required to be served upon a Company may be served

by leaving the same, or sending it through the post in a prepaid letter addressed to the Company, at their registered office,—Companies Act, 1862, sec. 62. Where one of several co-trustees manages the affairs of the trust, intimation to him alone is sufficient,—*Jameson* v. *Sharp*, 1887, 14 R. 643. In the case of *Blake* v. *Douglas*, 1860, 23 D. 15, the terms of an assignation in security were held to prove the subsistence of a debt, even though the bills granted in respect of it had prescribed, there being no proof that the debt was paid. The Policies of Assurance Act, 1867, just mentioned, provides a short form of assignation of assurance policies, which may be written either on the policy, or form a deed apart. This Act also provides that intimation may be made by a written notice of the date and purpose of the assignment; and that every policy is to specify the principal places of business at which notice of assignment is to be given.

The creditor in an assignation which bears to be in security of a special advance is not entitled to hold the security against further advances. A decision on this point will be found in the case of *Forbes* v. *Robb*, 1858, 21 D. 79. In this case the creditor advanced £500 on the security of a life policy for £1000. He afterwards advanced other £700, but the security was not extended to this further advance. In a question with the borrower's trustee, the creditor was found not entitled to retain the policy for the £700; see also the case of *Borthwick* v. *Scottish Widows' Fund*, 1864, 2 Macph. 595.

An assignation to a policy of life assurance, in terms absolute, as "for certain good and onerous causes and considerations," may be taken for sums instantly advanced or which may be advanced subsequent to its date, and if taken in those terms and without reference to the debt, it is sufficiently stamped with a duty of 10s., irrespective of the amount in the policy. It has already been noticed (page 13) that third parties having interest may take out and assign policies of assurance. A creditor is deemed to have an insurable interest in his debtor's life. The assignee of a life policy may sue upon it in his own name (30

and 31 Vict. c. 144). Since a false statement in the proposal form (which form is usually declared to be the basis of a life assurance), if it be material to the risk, is a good objection to a claim under the policy, not only against the party who made the statement, but also against an onerous assignee—*Buist and Others* v. *Scottish Equitable Company*, 1878, 5 R. (H.L.) 64—it is advisable in an assignee to get an admission by the company of the age of the assured, and, if possible, a declaration that the policy is otherwise indisputable. The Policies of Assurance Act, 1867, contains matter of the assignment of life policies and a form of intimation.

Loans on Railway and other Stocks.—The stocks are conveyed absolutely to the bank, and the bank and the borrower execute a mutual obligation, usually of the nature of an agreement, explaining the terms of the loan, providing for depreciation in the value of the securities during its currency, granting power of sale to the lender, &c. This document, known as a mortgage of stock, requires to be stamped with a duty of 10s. for every £5000 or part of £5000 borrowed,—see 34 Vict. c. 4. But no release or discharge of it is chargeable with any *ad valorem* duty. The mortgage of stock need not necessarily be of the form of an agreement. It may be framed so as to require execution by the debtor only. A form of the document in common use will be found in the Appendix.

On "short loans" against Stock Exchange Securities, which are usually of a readily marketable nature, the Scotch banks charge, as a rule, a half per cent. above the then current minimum discount rate of the Bank of England, but not less than the ordinary local bill rate for the time being, and require "cover" of about 20 per cent, *i.e.*, on £100 worth of stock or shares they will advance £80. The security is taken by the ordinary deed of transfer in favour of the bank's nominees, and duly registered in the books of the company.

In lending to a company registered after 1st January 1901, sections 6 and 14 of the Companies Act, 1900, regulate the necessary mode of procedure.

3. Transference of Corporeal Moveables.—The Sale of Goods Act, 1893, has codified the law relating to the sale of goods; and has made important changes as to the time when the property in the goods passes to the buyer. Thus, by section 16 of the Act, where there is a contract for the sale of *unascertained* goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained; and (sec. 17) where the goods are *specific*, the property is to pass when it is intended to pass, the intention being ascertained by the terms of the contract, the conduct of the parties, or the circumstances of the case. If the intention cannot be thus discovered, the property passes—(*a*) if the goods are in a deliverable state, at the date of the contract (unless where the seller has to weigh, test, or measure them, so as to fix the price, in which case no property passes till he does so, and sends notice to the buyer); (*b*) if the seller is bound to put the goods into a deliverable state, the property passes when he does so, and sends the buyer notice; (*c*) if the goods are sent on approval, or sale, or return, the property passes when the buyer accepts the goods, or when he does any other act adopting the transaction; or, if a time has been fixed for the return of the goods, by the lapse of that time; or, if no time has been fixed, by the lapse of a reasonable time without return of the goods. When the goods are *unascertained*, and the contract is for a sale by description, and goods of that description are unconditionally appropriated to the contract with the consent of both parties, or when they are delivered to the buyer, or to a carrier to be transmitted to him, the property thereupon passes to the buyer. By section 19 (1) the seller may in certain cases, by the terms of the contract, reserve the right of disposal of the goods until certain conditions are fulfilled, in which case no property will pass to the buyer, notwithstanding delivery.

Under the above Act (sec. 21), where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the

seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. It follows from this enactment that stolen goods can be recovered from any one, even from a *bona fide* purchaser, who buys from the thief. The Act makes the following exceptions, however, viz.—(1.) The provisions of the Factors Acts, the chief of which are—(*a*) where a mercantile agent is, with the consent of the owner, in the possession of goods, or documents of title to goods, any sale or pledge by him to one who takes in good faith, and in the ordinary course of business, is as valid as if expressly authorised by the owner; (*b*) if the owner has at one time consented to the mercantile agent having possession of the goods or documents of title, the recall or termination of the consent has no effect with regard to a person having no notice thereof; (*c*) if a mercantile agent has at some time had possession of the goods, with the owner's consent, and in consequence thereof gets possession of the documents of title, the owner is deemed to consent to his possession of the documents of title. In order to entitle a pledge to the protection of the Act it must not be for an antecedent debt or obligation. A pledge of the documents of title to the goods is deemed to be a pledge of the goods. (2.) The validity of any contract of sale, under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction. (3.) Where the seller has a voidable title to the goods, a *bona fide* purchaser gets a good title. (4.) Where the seller continues in possession of goods, or documents of title to goods, if he delivers them under any sale or pledge to a person taking in good faith and without notice of a previous sale, the sale or pledge is held to have the owner's authority. (5.) Where the buyer gets possession of goods, or documents of title to goods, delivery under any sale or pledge by him in the same circumstances is deemed to be with the consent of the owner. Again, by the Act of 1893 (sec. 39), subject to its provisions and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has, by implication of law,

(*a*) a lien on the goods, or right to retain them for the price, while he is in possession of them, if the price be due, or, if not, if the buyer be insolvent; (*b*) in case of insolvency of the buyer, a right of stoppage *in transitu;* and (*c*) a right to re-sell the goods after they have been retained or stopped *in transitu.* The seller can only retain for the price, not for another separate debt due by the purchaser; but the Act provides that the seller may attach them in his own hands, by arrestment and poinding, as effectually as if they were with a third party, although the property in the goods may have passed to the buyer. Where, however, a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith and for valuable consideration, the seller's right of retention or stoppage *in transitu* is defeated; so that in these circumstances a seller, although in possession, cannot retain the goods, or, although they are in course of transit, he cannot stop them. The documents requiring to be considered with reference to the transference of moveables are bills of lading, delivery orders, and warrants for goods.

(1.) *Bill of Lading.*—A bill of lading is an instrument under the hand of a shipmaster, acknowledging that certain goods have been delivered to him on board his ship, and binding himself to deliver them at the port of destination to the consignor or his order; or to the consignee by name, or his assigns, according to arrangement, certain risks of the voyage being excepted. If the consignee's name be not mentioned in the bill, the consignor indorses his own name on the back, with an order to deliver it to a particular person, or he indorses it in blank. In the case of a special indorsement, the shipmaster is bound to deliver the goods to the party named, or to his order; and in the case of a blank indorsement to the bearer of the bill of lading. The master is entitled to get delivery of the bill of lading in exchange for the goods.

A bill of lading is subject to stamp duty of sixpence. It

cannot be stamped after it is executed, and a penalty of £50 attaches to a bill of lading not duly stamped (Stamp Act, 1891 sec. 40).

A bill of lading is, by the law and usage of merchants, a negotiable instrument assignable by indorsation, and passes such right, but no better than the person assigning had in it. Bills of lading are made out in sets (usually three), one for the shipper, one to go with the ship, and one for transmission by post, and, like foreign bills, each bears a clause, "one of which being performed, the others to stand void." Unlike a bill of exchange, however, the indorsee of a bill of lading takes it as though the contract therein had been made with himself; but not so as to defeat any right of stoppage *in transitu* (see Sale of Goods Act, 1893), or claim for freight against the original shipper. By the Bills of Lading Act, 18 and 19 Vict. c. 111, "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, *to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement*, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself;" see the case of *Craig and Rose* v. *Delargy*, 1879, 6 R. 1269. In this connection, however, it must be borne in mind that where the indorsee is merely a security-holder, the intention of the parties in the transference will be taken into account and this section will not apply,—see *Tod and Son* v. *Merchant Banking Company of London, &c.*, 1883, 10 R. 1009, where the bank, the indorsees, were held, by allowing delivery to take place, to have lost their security, the bargain being in reality between the indorser and the purchaser. Where the price is unpaid, and the purchaser becomes insolvent, the seller, in a question with the buyer's creditors, is entitled to stop the goods *in transitu*. The right of stoppage *in transitu* subsists till the buyer, or his agent in that behalf, takes delivery of the goods, provided that, if they are in a ship chartered by the buyer, the master is in possession

of them as a carrier, and not as agent for the buyer. But the seller has no right of stoppage *in transitu* where the bill of lading has been indorsed to a third party for an onerous consideration, without notice of no satisfaction having been given for the goods.

Again, where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.—(Sale of Goods Act, 1893, sec. 19 (3).)

In granting advances against bills of lading, possession by the lender of a duly indorsed bill of lading is equivalent to a pledge of the goods represented thereby, but such indorsement, when by way of pledge, does not transfer to the lender liabilities under the contract. As, however, questions of contract may arise as between the seller and the buyer of the goods, which are pleadable in a question with the lender, since he acquires no higher right than the indorser, it is prudent in the lender to assure himself that the pledgor is financially sufficient for the loan, apart from such security. By a reference to the instructive case—*North-West Bank* v. *Poynter and Son and Another*, 1894, 22 R. 1—it will be seen that a bank holding a bill of lading as security may part with it, even to the pledgors, that they may sell the goods, and yet retain their right in the security as against an arresting creditor of the pledgors.

(2.) *Delivery Order.*—A delivery order (which is subject to a stamp duty of one penny) is an authority by the owner of the goods, addressed to the custodier of them, to give delivery to the party named in the note or his order.—(For full definition of such document and as to cancellation of stamp thereon, see Stamp Act, 1891, secs. 69 and 70). A delivery order is transferable like a bill of lading. The indorsement of it upon a sale will pass the property in the goods to the indorsee or holder

without intimation. Delivery orders frequently pass from hand to hand without intimation to the custodier of the goods. It seems quite clear since the passing of the Sale of Goods Act, 1893, that the property in the goods passes by indorsation and delivery, such being sufficient indication of the intention of the parties as to the passing of the property. Intimation is still necessary, however, if the document be transferred in pursuance of a contract of pledge, or a sale intended to operate as a pledge, —*Inglis* v. *Robertson and Baxter*, 1898, 25 R. (H.L.) 870. In this case Lord Watson stated that "the indorsation and hypothecation of delivery orders, although it may give the pledgee a right to retain the documents, does not give him any real right in the goods which they represent. He can only attain to that right by presenting the delivery orders to the custodier by whom they were granted, and obtaining delivery of the goods from him, or by making such intimation of his right to the custodier, as will make it the legal duty of the latter to hold the goods for him. His right, in so far as it relates to the goods, is in the nature of a *jus ad rem*, will be defeated if, either before he has obtained delivery or given such intimation, the goods are validly attached in the hands of the custodier by a creditor of the person for whom the custodier holds them." It was further held in this case that, although the Factors Act, 1889, section 3 (see p. 137), provides that a pledge of the documents of title to the goods shall be deemed to be a pledge of the goods, the clause was merely intended to define the full effect of a pledge of the documents of title made by a mercantile agent, by virtue of one or other of the sub-sections of the preceding clause (sec. 2), and that section 9 of the Factors Act (practically re-enacted by section 25 (2) of the Sale of Goods Act, which is to the effect that, where a person having bought or having agreed to buy goods, gets possession of the documents of title and delivers them under any pledge to any person receiving the same in good faith, and without notice of a vendor's lien, shall be as effectual as if made by a mercantile agent in possession of the goods with the owner's consent) does

not apply to the effect of obviating the necessity of intimating the delivery order to the custodier of the goods, where the person has got the documents of title in his own right, and in his own name as owner of the goods directly from a warehouseman, after the goods have been transferred to his name in the warehouse books; and that the section applies, only where the person pledging the goods has obtained the documents, either from the seller or with his consent.

In *Anderson* v. *M'Call*, 1866, 4 M. 765, a delivery order issued by the sellers in absolute terms (the transaction taking the form of an absolute sale, but intended to operate only as a pledge) was held not to pass the property in the goods, although intimation of the order had been made to the foreman of the sellers, who was in charge of a separate store kept by them. The original vendor of the goods, where the price has not been paid to him, has a right of retention so long as the goods stand in his name in the books of the warehouseman. This was solemnly decided by the House of Lords, affirming the decision of the Court of Session in the case of *M'Ewen* v. *Smith*, 20th March 1849 (Ross' Leading Cases, vol. ii. p. 91). The circumstances of this case were shortly these:—Smith and Company sold to Bowie and Company a quantity of sugar, and gave them an order on the custodier of the goods to obtain delivery. Bowie and Company granted bills to Smith and Company for the price. Thereafter, Bowie and Company sold the goods to M'Ewen, who paid them the price and received the delivery order indorsed, but did not intimate the transference to the warehouse-keeper. Bowie and Company having failed before retiring the bills granted by them to Smith and Company for the price, the latter took possession of the goods. A question then arose between M'Ewen, the last purchaser, and Smith and Company as to who was entitled to the goods. M'Ewen claimed them on the ground that he had paid Bowie and Company the price, and had received from them the original delivery order duly indorsed. Smith and Company, on the other hand, maintained that as the goods had

never left their possession, and as they had not got payment of the price from Bowie and Company, they were entitled to retain the goods till they received payment of the price. To this plea the Court gave effect. This might still be held in the case of the transfer of a delivery order in pursuance of a pledge or of an absolute sale, intended to operate as a pledge; but, as already noticed, the Sale of Goods Act (sec. 47) states that, where a seller has issued documents of title to a person as buyer or owner of the goods, the indorsation for value by that person of the documents of title defeats the seller's rights of retention and stoppage *in transitu*.

Where advances are made on the security of goods in a bonded warehouse, or in the custody of a middleman, the delivery order in favour of the creditor ought to be, *ex facie*, in absolute terms and duly intimated to the custodier, and the goods transferred to the creditor's name, and not bear to be in pursuance of a pledge. On this being done, the creditor is entitled to hold the goods not only as a security for advances made at the time, but for subsequent advances (see Factors Act, 1889, secs. 3 and 4). This was decided in the case of *Hamilton* v. *The Western Bank*, 1856, 9 D. 152. Here the bank discounted to Miller and Company a bill for £630 : 10s., on receiving from them an absolute order for delivery of certain brandy in a bonded store. In virtue of the delivery order, the brandy was transferred to the bank in the warehouseman's books. The delivery order was inclosed to the bank in a letter from Miller and Company which stated that the brandy was to be held as a collateral security until retirement of the bill. The bill was renewed at maturity for £500, and a similar letter was addressed by Miller and Company to the bank, stating that the brandy was to be held as a collateral security until the renewed bill was retired. This bill was duly paid by the acceptor at maturity. Shortly before this bill fell due, Miller and Company obtained a further accommodation of £400 from the bank, but no writing passed between the parties extending the security over the brandy to this last advance. Miller and

Company became bankrupt, the £400 being still due to the bank, and the brandy still standing in their name. In these circumstances, the trustee on Miller and Company's estate demanded restitution of the brandy from the bank, on the ground that it was only pledged for a *special* debt, which had been satisfied. The Court held that the contract did not constitute a contract of pledge, but that it was a mere transference of proprietary right, under which the bank was entitled to hold the goods until all advances made to the owners were repaid.

(3.) *Warrants for Goods.*—Warrants for goods, which require a stamp duty of threepence, are issued by public warehouse-keepers, and are documents of title which represent the goods, and are transferable by indorsation. In the case of pledge, or absolute sale intended to operate as a pledge, however, the holder must intimate the transference to the warehouse-keeper. As regards the effect of iron warrants, see *Bovill* v. *Dixon*, 21st February 1854, and in the House of Lords, 1856, 19 D. (H.L.) 9; also *Merchant Banking Company of London* v. *Phœnix Bessemer Steel Company*, 5 L.R. Ch. Div. 205.

4. Pledge.—The contract of pledge is frequently resorted to in trade for the purposes of obtaining advances of money. It is constituted by delivering to the party making the advance a moveable subject, or the vouchers of a debt, to be held by the creditor until the advance is repaid. Pledge does not, like an absolute transference of moveables, confer a right of property in the subject impignorated. It is an inferior right to that of property. It is distinguished from mere retention or lien, which only involves a power by the retainer to deprive the owner of the possession and use of the article. Unless power be given in the contract to the creditor to sell, this right can only be exercised by judicial authority. Debts can only be pledged when identical with the document, as in bills and notes.

The foundation of pledge is actual custody or possession of the subject by the creditor, without which there can be no complete pledge, there being no constructive possession in pledge.

It frequently occurs in trade that a merchant obtains an advance against goods placed in a warehouse belonging to himself, by delivering to the party making the advance the key of the warehouse. Delivery of the key of a warehouse was held by the House of Lords to be actual delivery of the goods in the warehouse, in *Maxwell and Co.* v. *Stevenson*, 1831, 5 W. & S. 269. This was the case of a sale, but there seems no reason to doubt that the same principle would apply to the case of pledge, as it was held to be *actual* delivery of the goods. In an old case, *More* v. *Dudgeon and Brodie*, 3rd July 1801, the Court held that, where the key of a warehouse was truly delivered, the circumstance of the sellers having it in their power, by an open compartment over a communication door, to get access to the loft and bar the door to the exclusion of the buyers, could have no effect in destroying the reality of the delivery and possession.

The terms of the contract of pledge are generally established by writing. If the goods are pledged for a specific debt, they can be held only as security for that debt; and the creditor, in a question with a trustee in bankruptcy, would be bound to restore the goods on receiving payment of that debt, even though he has made further advances to the pledger,—see the opinions of the Judges in the case of *Hamilton* v. *The Western Bank*, 1856, 9 D. 152; see also *Alston's Trustee* v. *Royal Bank of Scotland*, 1893, 20 R. 887. When, therefore, further advances are to be made after a specific pledge has been constituted, the pledge should be extended to the further advance, or made applicable to the general obligations of the pledger. In an *English* case, *Jones* v. *Peppercorn*, 3rd December 1858, where certain bonds, payable to bearer, were deposited with a money-lender in security of a specific advance, which when sold by him yielded more than the specific advance, it was held by the Vice-Chancellor that the broker had a lien over the surplus for his general balance. In the *Royal Bank of Scotland* v. *Saunders and Son's Trustees*, 1882, 9 R. (H.L.) 67, it was held that where bills have been drawn against goods deposited in security in the acceptor's hands, and both drawer and acceptor

have failed, the holder cannot claim to have the goods applied in payment of the bills, but must rank on the estates of both as an ordinary creditor; and that, while the acceptor's estate will be entitled to relief out of the value of the goods for all dividends paid in respect of the bills, the drawer's estate will have right to the balance of the goods after such relief has been given. The acceptor referred to in this case was an accommodation party. In the *National Bank of Scotland, Ltd.* v. *Dickie's Trustee*, 1895, 22 R. 740, it was held that, where a stockbroker who held stock in his own name for behoof of a client transferred it to the bank in security of a specific advance which he was authorised by his client to obtain, the bank, being aware that the stock did not belong to the broker (although the client's name was not disclosed), were not entitled to hold these securities against the broker's general balance.

5. Deposit of Titles and other Securities.—Title-deeds, bonds, and the like securities are sometimes deposited with a lender in security of advances, but such a deposit gives the lender no security, except in the case of negotiable securities payable to bearer. Under the Companies Acts, 1862 to 1900, calls already made, though the time of payment has not yet come, may be validly mortgaged. It is also competent to mortgage calls determined upon, though not yet made. Power to mortgage future calls must be reserved either in the memorandum or articles of association of the company.

By the Companies Act, 1900 (sec. 15), every mortgage for the purpose of securing an issue of debentures, or on uncalled capital, shall be void as against the liquidator or any creditor of the company, unless filed with the registrar for registration (in a register of mortgages appointed by the Act to be kept in respect of each company) within twenty-one days, in terms of the Act, so far as any security is concerned, without prejudice to any personal obligation. The particulars required by the Act to be entered in the register to consist of—(*a*) the date; (*b*) the amount; (*c*) particulars of the property; and (*d*) the

names of the mortgagees. The section, however, provides that, where a series of debentures containing any charge, to the benefit of which the debenture-holders are entitled *pari passu*, is created by the company, it shall be sufficient to enter in the register—(*a*) the total amount; (*b*) the date of the resolution and of the deed creating the security; (*c*) a general description of the property; and (*d*) the names of trustees for debenture-holders.

CHAPTER XII.

BANKER'S LIEN, COMPENSATION, NOVATION, &c.

Retention or Lien is a right to retain the property of another till a debt due by the proprietor to the custodier is paid, or as a security for a general balance arising in account between the parties. Lien is of two kinds, special and general. Special lien entitles a person to retain the subject-matter of a contract till the counterpart of the contract be fulfilled (*e.g.*, a carrier is entitled to retain the goods which he carries until the carriage be paid). It operates as a security for the counterpart, and seems to apply to all contracts, unless it be waived. General lien extends beyond the limits of the particular contract in respect of which possession of the subject may have been obtained, and gives the custodier a right of lien over goods or money obligations in his possession, belonging to the principal, for the general balance arising on account between them. It is competent, *inter alios*, to factors or agents, and bankers. It may also be created by express contract, or be stipulated for in advertisement, or established by the usage of trade.

The commerce of the country being so largely carried on by means of mercantile agents or factors, the Courts of law have always been disposed to favour the agent's right to a general lien over all the goods of the principal in his possession, not specially appropriated or contracted to be sold. The indebtedness to the agent must, however, arise out of or in course of the agency. The ground on which lien is so favoured is that an agent is very readily induced to interpose his credit on behalf of the principal, on the faith of his being able to indemnify himself from the property of the principal which may be, or may afterwards come to be, in his possession; and

that it is for the advantage of trade that agents should have a right of lien for obligations undertaken by them on account of the principal.

Possession is an essential requisite of lien, and the right endures only so long as possession continues. If, therefore, the factor or agent parts with the possession of the property of his principal, he parts with his right of lien at the same time. But the lien will revive on the property being restored to the possession of the agent, at least as regards mercantile agents, the rule being different in the common case of retention. It is, however, to be observed that the possession must have been obtained in a fair and legitimate way, and in the course of the agency. If it has been obtained improperly or accidentally, the right of lien will not hold.

Bankers, being money agents, have a general lien over all monies and paper securities in their hands belonging to their customers, for payment of the general balance due on account between them, unless such monies or securities have been deposited with the banker *for a specific purpose.* Such subjects of lien consist, in Scotland, mainly of bills lodged for collection, and negotiable securities transferable by delivery. The rule as to banker's lien is thus laid down by an eminent English judge. "It is very proper that there should be a known rule to govern the conduct of all persons whose dealings with bankers are very extensive; and that rule is, that no person can take any paper securities out of the hands of his bankers without paying him his general balance, unless such securities were delivered under a particular agreement which enables him to do so." In accordance with this rule, a banker has no lien over bills sent to him for the special purpose of negotiation, or bills left with him for discount, for which he refuses to give money (see the case of *National Bank of Scotland, Ltd.* v. *Dickie's Trustee*, referred to page 146). Nor has he a general lien over bills specially appropriated. For example, if by special arrangement a bill is indorsed in security of another bill, which has been discounted, and the banker obtains payment of the discounted bill, he

cannot retain the security bill for his general balance, but is bound, under the special agreement, to restore it to the customer. But if bills in the ordinary course of business are indorsed to a banker in security without being specially appropriated to a particular debt, he has a lien over such bills for his general balance. Banking companies generally have, by their constitution, a lien over their own stock in security of advances made to shareholders. But a banker has no lien over his customer's plate-chest which has been deposited with him for safe custody, or over securities left in his hands by mistake. The customer of a bank, whose account was overdrawn, lodged with the bank certain annuity bonds, transmissible by delivery and payable to bearer, receiving from the bank agent receipts bearing that the bonds were held "for safe keeping on your account and subject to your order." The customer died leaving his account largely overdrawn and a large amount of bonds in the bank's hands. His estates were sequestrated after his death. In an action by the trustee against the bank for delivery of the bonds, the Court *assoilzied* the defenders, holding—(1) that, as the defenders had the custody of the bonds, there was a presumption in favour of their having a right of retention over them; (2) that this presumption was not rebutted by the terms of the receipts, which did not fully express the terms of the deposit, and were consistent with the bank having a right of retention; and (3) that the rest of the evidence in the case supported the presumption in the bank's favour.—*Robertson's Trustee* v. *Royal Bank*, 1890, 18 R. 12.

In determining questions of lien it is important to note the distinction between discounted bills and bills deposited in security of advances. In discounting a bill the banker either pays to the holder the sum contained in it, under deduction of interest to the date at which it becomes payable, or he carries the amount, less discount, to the credit of the holder's operative account. The banker in this way becomes purchaser and proprietor of the bill; and, consequently, it is not subject to the right of lien. With regard to bills indorsed in security of

advances, the banker has no right of property in them, but only the lesser right of lien over them. The customer is entitled to redeem such security bills by repaying to the banker the amount of his advances. The indorsation to the banker, however, entitles him to receive and demand payment of a security bill from the parties bound by it. It is a settled point, that if a banker accepts bills for the convenience of his customer, on an agreement that he should receive a remittance in time to meet them, and the customer sends bills, the banker will have a general lien over such bills, as being unappropriated. It is also settled that where a banker makes advances against bills lodged with him, and afterwards discounts certain of the bills, his lien over the remainder will subsist, even to the effect of securing him against loss in the discounted bills.

The purpose for which a bill has been indorsed to a banker could formerly be proved by his writ or oath only, and not by parole evidence; but by the Bills of Exchange Act, 1882, "any fact relating to a bill, which is relevant to any question of liability thereon, may be proved by parole evidence."

The banker's lien does not entitle him to retain for his own security where the debt is not yet due, as in the case of a bill not yet arrived at maturity, unless either the acceptor or the drawer of the bill is bankrupt or insolvent, or *vergens ad inopiam*, —*Paul and Thain* v. *Royal Bank*, 1869, 7 Macph. 361; but in *Ferrier* v. *British Linen Company*, 20th November 1807, a banker was held entitled, on the *bankruptcy* of his customer, to retain in security of discounted bills current a sum at the credit of the bankrupt's account.

Compensation.—Compensation, or, as it is called in England, "set-off," operates to the effect of extinguishing two mutual debts, where the same parties are debtor and creditor to each other. Where the debts are not equal in amount, they are extinguished so far as there is a concourse of debit and credit, so that the debtor in the larger sum becomes debtor only in the balance. Where pleaded, compensation operates backwards, and stops interest from the period of concourse.

The rules upon which compensation is founded are :—1. The debts must be of the same nature and description. An obligation to deliver goods cannot be set off against a pecuniary obligation. But the mere fact of security being held for one of the debts will not prevent compensation being pleaded. 2. The parties must be mutually creditors of one another in their own right. Thus a bank agent due a debt in his private capacity cannot plead compensation of that debt by a debt due to the bank he represents. A debt due by a company may be compensated by a debt due to a partner, with that partner's consent, but a debt due to a company cannot be compensated by a debt due by a partner to the creditor of the company. When, however, the company is dissolved, and is solvent, the debts due to the company become the property of the partners, and compensation may be pleaded. A banker is not entitled to set off executry funds, lodged in name of the executor, against the obligations of a deceased customer,—*Gray's Trustees* v. *Royal Bank of Scotland*, 1895, 23 R. 199. 3. Both the debts must be due at the same time, or at all events when compensation is pleaded. A party cannot set off a debt, the term of payment of which has not arrived, against a debt presently owing and prestable. A person cannot set off a debt incurred by him subsequently to the bankruptcy against a debt due to him by the bankrupt incurred prior to bankruptcy,—*Taylor's Trustees* v. *Paul*, 1888, 15 R. 740. 4. Both debts must be liquid—that is, vouched for, by a document which *ex facie* proves an absolute debt (*i.e.*, a bond, bill, or extract decree of Court). It is, however, sufficient if the debt be instantly verified by writ or oath. If one of the debts be conditional, compensation cannot be pleaded against a debt for which the other party holds a written obligation. But if one of the debts be liquid, and the other due as on open account, the Court may, on grounds of equity, delay decree till the creditor in the illiquid debt constitute his claim, if it is capable of being constituted within a reasonable time. Where both claims are illiquid, they must be ascertained by separate actions, which are generally conjoined by the Court.

(On this see *M'Farlane* v. *Robb*, 1870, 9 Macph. 370, as very instructive.)

Compensation of a debt due by the drawer of a bill to the acceptor cannot be pleaded by the acceptor against a holder in due course, such being a mere personal defence available between the drawer and acceptor.—(See Bills of Exchange Act, sec. 38 (2)). Compensation may be pleaded not only by the principal debtor, but by a cautioner or any one having an interest in extinguishing the debt, but it may not be pleaded on a debt obtained *mala fide* with the purpose of acquiring an undue advantage.

Compensation does not extinguish mutual debts *ipso jure*, but must be pleaded in defence of a suit by one of the parties against the other. It does not stop the running of prescription ; so that a debt which has been allowed to prescribe cannot be set off against a debt which has not prescribed, even if the debts concurred before the prescription had run.

In the case of bankruptcy the ordinary doctrine of compensation has been extended into something very similar to retention so as to admit of any kind of claim, future, contingent, or disputed, being set off against a liquid and certain debt due to the bankrupt. The debts must have concurred, and the party pleading compensation must have acquired his debt prior to the date of bankruptcy. An exception to this is illustrated by *Hunny and Sons' Trustees* v. *Armstrong Brothers*, 1877, 4 R. (H.L.) 43, where Lord Blackburn says : "It has for many years been decided, both in England and Scotland, that if the indorser become a party to the bill before the bankruptcy in the one country, or the sequestration in the other, he may set it off on becoming the holder afterwards." The date of bankruptcy as affecting the concourse of debts is fixed by the first deliverance in a sequestration, or by decree of cessio.—(See Goudy on Bankruptcy.)

Novation.—Novation is the substitution of a new obligation by a debtor to his creditor, the effect of which is to extinguish

the old obligation and make the debt rest upon the new. It is very important that bankers should keep the effect of this principle in view where they hold guarantees or securities for debts. There is a presumption, however, against it, and that the new obligation is taken as additional security, unless the original security be given up, or the new one be expressly taken in satisfaction of the old. For example, if a party guarantees payment of a bill, and that bill is paid off by a renewal, the cautioner will still be liable on the old bill, unless the old bill has been delivered up.—See *Hay and Kyd* v. *Powrie*, 1886, 13 R. 779.

Delegation.—Delegation is the substitution of a new debtor for a former debtor. There is a presumption against it, and for additional security, as in the case of novation. Delegation does not take place without the consent of *three* parties, viz.—the original debtor, the new debtor, and the creditor.

Confusion.—Where the same person becomes both debtor and creditor in an obligation the debt is discharged *confusione*, unless the person has an interest to keep it alive. Confusion may take place either where the debtor succeeds to the creditor, or where the creditor succeeds to the debtor.

CHAPTER XIII.

DISCHARGE AND PRESCRIPTION.

The general rule of law with regard to the extinction of debts is, that those constituted by a written obligation must be discharged in writing. It has been held that the debtor in a bond was not entitled to prove payment of it by parole evidence. Payments of money above £8 : 6 : 8 are not provable by parole evidence, except in the case of ready-money transactions, "where payment of the price is the counterpart, and the immediate counterpart, of the delivery at the same time of the subject sold,"—*Shaw* v. *Wright*, 1877, 5 R. 245. There is another exception in the case of bills. By the Bills of Exchange Act, 1882, section 100, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may, in any judicial proceeding in Scotland, be proved by parole evidence.

The discharge is an instrument of the simplest form. It is quite sufficient if the document acknowledges or clearly expresses payment of the debt.

Of Payment.—The creditor is bound to take payment from the debtor, or from any one acting for him, or from any one interested in the debt, such as a surety. He is not bound, however, to take payment of a partial sum. If payment is made by a surety, the creditor is bound to give him an assignation to enable him to operate his relief. But the creditor is not bound to assign the debt to a stranger paying it, except when he pays at the request of the debtor. Where there is no evidence to the contrary, payment is always presumed to have been made by the proper debtor, or with his money. Thus, a bill marked

"paid" is presumed to have been paid by the acceptor, and not by the drawer or indorser.

Payment may be made to the creditor or to any one authorised by him to receive it, such as a factor or agent. Payment will also be good when made *in bona fide* to a person whom the creditor has led or allowed the debtor to believe had authority to receive it. It has been held that payment made to a creditor after sequestration of his estates was good, the debtor not being aware of the sequestration; also, that payment by a debtor at a distance from home, after an arrestment was used at his dwelling-house, was good—he being ignorant of the arrestment.

Where a party is owing separate debts to the same creditor, the creditor is entitled to apply an indefinite payment to the worst secured debt, if he choose. But, on the other hand, the debtor, at the time of making payment, is entitled to appropriate it to any particular debt. In the case of pupils, the discharge of the father, as administrator-in-law, will be sufficient,—see *Dumbreck* v. *Stevenson*, Court of Session, 18th February 1856; House of Lords, 1861, 23 D. (H.L.) 1, where a discharge by a father of a legacy to his pupil son was sustained. A *minor pubes* must grant the discharge along with his father as his curator.

Implied Discharge.—Payment of a debt is presumed if the obligation is found in the possession of the debtor; but this presumption may be rebutted by proof that the debtor acquired the possession in an accidental or illegal manner. Termly payments, such as rents, interests, feu-duties, &c., due prior to the time for which the creditor has granted to the debtor three consecutive discharges for termly payments, are presumed to have been paid; but the presumption may be rebutted by parole.

We have already seen that debts may be discharged by compensation and novation.

Prescription.—It remains to be noticed that debts and ob-

ligations are extinguished by prescription, which is a legal presumption of payment or abandonment of the debt. The period within which debts prescribe varies according to the nature of the debt or obligation.

Triennial Prescription.—All debts not founded on written obligations arising out of a course of dealing or service prescribe in three years. The triennial prescription applies to merchants' and law-agents' accounts, salaries, furnishings to a domestic establishment, house rents where the lease is verbal, wages to workmen and servants, &c. But it does not apply to the price of goods sold on commission; nor to money received by an agent for his constituent; nor to cash advances; nor to contracts for repairs (Act 1579, c. 83).

Prescription begins to run from the date at which the debt or termly payment became due. In the case of a continuous account, it runs from the date of the last item in it. The whole of the account is saved from prescription if the last item is within three years, and there is no blank for three years in the continuity of the account.

After the lapse of the years of prescription, the creditor must prove the constitution and subsistence of the debt by the writ or oath of the debtor. With regard to the writ of the debtor, it must be dated after the lapse of the years of prescription, and not within them. It must also distinctly identify the debt in question. If the debt is referred to the debtor's oath, and he swears that he paid it, or that he gave money to his wife, son, or manager to do so, where they have had superintendence, the claim will be lost.

Prescription will be interrupted by bringing and executing an action at any time within the three years. If the debt is constituted by bill or other written obligation, it will be taken out of the triennial prescription.

Quinquennial Prescription.—The Act 1669, c. 9, anent Prescriptions, enacts that "all bargains concerning moveables

or sums of money, proveable by witnesses, shall only be proveable by writ or oath of party, if the same be not pursued for within five years after making the bargain." Ministers' stipends prescribe in five years after the term of payment, and the like prescription strikes at farm rents five years after the tenant's removal from the lands, if the lease be not in writing.

Sexennial Prescription.—This prescription is solely applicable to bills and promissory notes; and the effect of it has been considered in treating of these instruments.

Septennial Prescription.—The septennial prescription applies to cautionary obligations; and has already been explained under that head.

Decennial Prescription.—This prescription is applicable to actions of count and reckoning between minors and their tutors and curators. If action be not pursued and insisted on within ten years after termination of the guardianship it falls.

Vicennial Prescription.—By the Act 1669, c. 9, holograph missive letters, holograph bonds, and subscriptions in compt books, without witnesses, prescribe in twenty years. This prescription strikes at all holograph writs on which an obligation can be founded. It has reference, not to the *subsistence*, but to the *constitution* of the debt. It will be observed that the debt rests upon a written obligation, holograph of the debtor, but not tested. Had it been tested, the debt would have endured for forty years. The reference to the oath of the debtor in such questions, therefore, is—whether the writing and the signature be authentic? If the debtor admit the writing and authenticity of the signature, he will be liable in the debt, even though he should swear that he had paid it.

Negative or Long Prescription.—All moveable and heritable bonds, contracts, and obligations whatever prescribe in forty

years, and are of no avail if the creditor does not take document thereupon, or pursue for the same within that space. The prescription is held to apply to all rights and obligations whatever, heritable or moveable, which are not struck at by the shorter prescriptions. The prescription commences to run from the term of payment, and not from the date of the obligation. The years of minority and of incapacity of the creditor do not count in reckoning the years of prescription.

Prescription may be interrupted either judicially or extrajudicially. Judicial interruption is by bringing an action into Court, or doing diligence on the obligation, before the lapse of the forty years. Extrajudicial interruption is by taking a new obligation for the debt, or a bond of corroboration, or an engagement to pay interest.

The effect of the long prescription is to extinguish the debt entirely. It does not, like the shorter prescriptions, with the exception of the septennial, permit of a reference to the oath of the debtor, and the only pleas that can be put forward in answer are interruption, minority, and *non valens agere*.

By the Conveyancing Act, 1874, *the positive prescription* (forty years) is reduced to twenty years.

CHAPTER XIV.

DILIGENCE.

1. Arrestment.—The diligence of arrestment is used for the purpose of attaching moveables in the hands of a third person belonging to the debtor, or debts due to him. The effect of the arrestment is to prohibit the person in whose hands it is used from delivering the moveables or paying the debt to the person against whom the diligence is directed, until the debt for which it is used be satisfied or paid. The party at whose instance the diligence proceeds is called the arrester, the person in whose hands it is used is called the arrestee, and the person to whom the fund arrested belongs is termed the common debtor.

Arrestment is of two kinds—*arrestment in security*, and *arrestment in execution*.

Arrestment in Security.—The diligence is so termed when it is used for a debt for which the creditor has raised an action, or for a debt which is not yet due if the debtor be *vergens ad inopiam*. The warrant to arrest in security may be either in the summons or in letters of arrestment, or in a precept from an inferior Court. The terms of the warrant are, that the fund shall "remain under sure fence and arrestment until sufficient caution be found that the same shall be made forthcoming to the complainer, as accords of law." Where the arrestment is used on a summons, it must be executed within twenty days of the date of the arrestment, and brought into Court within twenty days of the diet of compearance, or on the first sederunt day after, if in vacation; otherwise the arrestment will fall. On the debt being constituted by decree of the Court, the arrester will then be in a position to bring an action of furthcoming against the arrestee.

Arrestment in execution proceeds upon a warrant on a *decree* of the Court against the common debtor, or upon an extract of a bond or other obligation which contains a clause consenting to registration for execution in the Books of Council and Session, or of an inferior Court, and which has been there registered, or upon an extract registered protest of a bill. The fund remains arrested "aye and until the complainer shall be fully satisfied and paid."

An arrestment in execution can be loosed only on payment of the debt, but the Court of Session will generally loose an arrestment in security on caution being found that the funds will be made furthcoming to the arrester; and where a larger sum is arrested than what is due to the arrester, the Court will restrict the diligence. If the arrestment is used oppressively and improperly, the Court will recall it on cause shown; and the party using it may be subjected in damages. The mention of a specific sum in the schedule of arrestment, with the words "less or more," does not constitute a limitation. So an arrestment "for £50, less or more," was held to cover the whole expense of the action, which brought the claim much beyond £50,—*Ritchie* v. *Maclachlan*, 1870, 8 Macph. 815. An arrestment is futile unless it can be followed up and the diligence worked out by a decree, effectually transferring from the common debtor to the arresting creditor the obligation which was originally prestable to the former by the arrestee,—*Lucas' Trustees* v. *Campbell and Scott*, 1894, 21 R. 1096.

Furthcoming.—The furthcoming is an action raised by the arrester against the arrestee and the common debtor, for the purpose of ascertaining the amount of property in the hands of the arrestee, and of making it available for payment of the arrester's claim, or, where the subject is corporeal, to authorise a sale and payment out of the proceeds. The arrestee has no interest in the justice or accuracy of the claim of the arrester. It is the business of the common debtor to look after this, and for this purpose he is made a party to the action. The arrestee,

if he has any property in his possession belonging to the common debtor, is bound to give up a correct statement of it, and if he does not do so, all the channels of evidence will be open to the arrester to prove the amount of property held by the arrestee. The only defences competent to the arrestee are, that he has no funds, or that he has a lien over them, or that the arrestment is informal. It is important for arrestees to keep in view that, if the arrestment is informal, payment under a decree of furthcoming will not save them from a demand at the instance of the original creditor, and in such a case they may have to pay a second time. If the fund arrested be a debt, decree of furthcoming will go out for the amount thereof, or for so much of it as will pay the arrester's claim. If the property arrested be goods, the arrestee will be ordained to deliver them up for sale, as in poinding, the proceeds to be paid to the arrester. The action of multiplepoinding is resorted to where there are competing claims.

Effect of Arrestment.—The general rule is, that the debtor's property in the possession of the arrestee at the date of the arrestment is attached, but funds or goods coming into the possession of the arrestee, after the arrestment has been used, will not be attached. For example, if an arrestment is used in the hands of a banker against a customer who has no funds at his credit at the time, but who pays in money the day after, such money would not be attached by the arrestment. In the case of rents or interests payable half-yearly, an arrestment used on the term-day will only attach what is due for the previous half-year, and will not attach the half-year's payment to become due at the subsequent term. An arrestment used betwixt terms will attach the current half-year's rent or interest.

Alimentary funds, pensions, and judges' salaries are not arrestable, nor are workmen's wages, except in so far as they exceed 20s. a week,—33 and 34 Vict. c. 63. An exception holds in the case of arrestments used on decrees for alimentary allowances, and for rates and taxes imposed by law.

Arrestments are preferable according to the date at which they are used.

Arrestment in security covers the interest of the debt and the expense of the action, but not the cost of the arrestment itself.

Prescription of Arrestment.—By the Personal Diligence Act, arrestments in execution prescribe in three years from their dates, and arrestments used on the *dependence* of an action prescribe in three years from the date of the debt being constituted by decree. Arrestments used under the Small Debts Act, of sums not exceeding £12 sterling, prescribe in three months, unless a furthcoming or a multiplepoinding be brought.

2. Poinding.—By the diligence of poinding, a debtor's corporeal moveables may be attached for payment of his debts. The goods may be in the hands of the debtor or of another; and by the Sale of Goods Act, 1893 (sec. 40), a seller of goods may attach the same while in his own hands or possession by arrestment or poinding, and such arrestment or poinding shall have the same operation and effect, in a competition or otherwise, as an arrestment or poinding by a third party. Under the Personal Diligence Act, 1838, all decrees of the Court, and extracts of liquid documents of debt recorded for execution, contain a warrant to charge for payment under the pain of poinding and imprisonment; and on expiry of the days of charge the debtor's moveable effects may, under the decree, be poinded for payment of the principal sum and interest, and for so much as will cover the expense of the diligence. Goods in which the debtor has only a joint interest, or in which he is liferented, cannot be poinded. Nor can plough goods and implements of husbandry be poinded during the season of labouring, if the debtor has other goods to be poinded. In *Lochhead* v. *Graham*, 1883, 11 R. 201, it was held that it was competent for a creditor to poind goods of his debtor in the creditor's own possession.

The form of procedure is as follows :—A messenger-at-arms, accompanied by two persons to act as valuators, and who may also act as witnesses to the poinding, proceeds to the place where the debtor's effects are situated, and after reading the warrant and crying Oyez three times, makes a schedule of the goods poinded, and of the value put upon each article by the valuators, to whom the messenger administers an oath. The poinded goods are then offered back to the debtor at the values put upon them, and if he, or any one in his name, tenders the value, the poinding must be stopped. The poinded effects are left on the ground, and a schedule is delivered to the possessor specifying the articles, the value, and the name of the poinder. The officer must then, within eight days, report the execution of the poinding to the Sheriff in due form ; and upon this being done, the Sheriff grants warrant of sale by public roup, to take place at the sight of a judge, not sooner than eight, and not later than twenty days after publication of the notice of sale. Six days' notice of the sale must be given by serving a copy of the warrant upon the debtor or other possessor of the goods. Such notice may be by registered letter, where the debtor is resident out of the jurisdiction of the Sheriff who granted the order,—*Lochhead* v. *Graham*, *supra*. The upset price must not be less than the appraised value ; and if no offerer appears, the judge of the roup delivers to the poinder as much of the goods poinded as will, at the value put on them, pay the debt, interest, and expenses. If the goods are sold, the judge must report the sale to the Sheriff within eight days, and lodge with the clerk the roup roll and an account of the proceeds and expenses. The Sheriff then orders the poinder's debt to be paid out of the proceeds.

Any other creditor in possession of a warrant to poind may have his diligence conjoined with that of the poinding creditor, by producing the warrant to the messenger before the poinding is completed, so as to participate in the fund made available under the diligence.

Where a creditor finds that another has got the start of him

in carrying through a poinding of a debtor's effects, the preference may be cut down in either of three ways. (1.) By rendering the debtor notour bankrupt, in terms of the Bankruptcy (Scotland) Act, 1856. The 12th section enacts that all "arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date." This section also declares that a poinding creditor who has carried through a sale, and an arresting creditor who has obtained a decree of furthcoming, shall be liable to an action at the instance of any other creditor producing liquid grounds of debt or decree of payment within the sixty days for a proportion of the sum recovered,—see *Gallacher* v. *Ballantine*, 1876, 13 S.L.R. 496. (2.) Sequestration under the Bankruptcy Act renders ineffectual arrestments or poindings executed on or after the sixtieth day prior to the sequestration; and the trustee is entitled to demand from creditors who may have obtained payment the funds recovered by them, under deduction of the expenses *bona fide* incurred by them. (3.) By the Companies Act, 1886, section 3, the winding up of any company under the Companies Acts, 1862 to 1886, is, in the case of a winding up by the Court, as at the commencement thereof, and in the case of a winding up subject to the supervision of the Court, as at the date of the presentation of the petition, on which a supervision order is afterwards pronounced, equivalent to an arrestment in execution and decree of furthcoming, and to an executed or completed poinding; and no arrestment or poinding of the funds or effects of the company, executed on or after the sixtieth day prior to the commencement of the winding up by the Court, or to the presentation of the petition on which a supervision order is made, as the case may be, is effectual.

For Crown debts, the debtor's whole moveable effects, without exception, may be poinded, and the goods so poinded shall remain in the custody of the officer poinding them till sold by him,—43 and 44 Vict. c. 19, sec. 97.

Diligence affecting Heritable Rights.

1. Inhibition.—The diligence of inhibition is used to prevent a debtor, possessed of heritages, from selling or alienating them, to the prejudice of the inhibiting creditor's debt. It does not affect property acquired after the diligence is executed, with the exception of land to which the debtor succeeds under a deed of entail or other indefeasible title.

Inhibition may proceed either upon a liquid document of debt or upon the dependence of a summons raised for constituting a debt. It is incompetent where the summons does not have pecuniary conclusions other than for expenses,—*Burns* v. *Burns*, 1879, 7 R. 355. Inhibition may be used to secure a debt not yet due, where the debtor is *vergens ad inopiam*.

Inhibition does not prevent the debtor disponing or burdening his lands, in implement of a legal obligation contracted previously, as it strikes against voluntary deeds only. It has been held that the use of inhibition against a debtor does not destroy the effect of a cash-credit heritable bond, recorded prior to the date of the inhibition, as a security to a bank for advances made after the date of the inhibition,—*Campbell's Trustee* v. *De Lisle's Executors*, 1870, 9 Macph. 252.

The letters of inhibition direct the messenger to charge the debtor not to sell, alienate, or burden his property to the prejudice of the creditor, and to charge the lieges not to purchase the debtor's heritages, nor receive from him any deed of alienation. The inhibition is executed against the debtor personally or at his dwelling-place, and if he is furth of Scotland, the writ is executed against him at the Edictal Office, within the Register House, Edinburgh. The inhibition is executed against the lieges by being registered in the Register of Inhibitions and Adjudications within forty days.

A *notice of inhibition* can be registered before it is executed against the debtor, and if followed by the inhibition and execution thereof, duly registered, within twenty-one days of the notice, the inhibition takes effect from the date of the notice —Titles to Land Consolidation Act, 1868, sec. 155.

The effect of the diligence is merely prohibitory, and gives no direct right in the property, and the creditor is only entitled to reduce deeds which are to his prejudice, executed after intimation is used. In order to give himself an active right he must follow the inhibition by adjudication. For this purpose the creditor must use the diligence of adjudication.

Inhibitions prescribe in five years, but they can be registered anew *before* the expiry of the five years,—Conveyancing Act, 1874.

If the debtor whose property is under inhibition be sequestrated, the trustee can sell, but the inhibition will receive effect as a preference in the rankings.

2. Adjudication.—By this diligence the debtor's heritable estate may be transferred to his creditor, in security and satisfaction of a debt constituted by decree or by a liquid document of debt not prescribed, and not contingent.

Adjudication is effected by a summons raised at the instance of the creditor against the debtor, concluding to have his heritages adjudged to the creditor in payment of the debt. After decree is obtained, the creditor's right must be published, by recording an abbreviate in the Register of Abbreviates of Adjudications within sixty days. The decree following thereon is a warrant for infefting the adjudger in the property, and his title may be completed by recording it in the Register of Sasines.

The right acquired by the adjudger is not absolute. The subjects may be redeemed by the debtor at any time within ten years, the period of the legal reversion. The adjudger's right becomes irredeemable upon his obtaining a decree of the Court declaring the legal expired, or by possession upon a charter and sasine for forty years from the expiry of the legal (*i.e.*, the expiry of the period within which the subjects are redeemable).

The Act of 1661 gives an equal ranking to all adjudications led before the first is made effectual with those led within a year and a day thereafter.

Although the term of payment of a debt is not come, or the debt be contingent, the Court of Session, *ex nobili officio*, will allow the creditor to lead an adjudication in security, where the debtor is *vergens ad inopiam*, or the creditor is in danger of losing his debt by other creditors adjudging within year and day. This adjudication subsists merely as a security, and has no legal term for redemption, and can never form a title to the property.

It has been held competent to adjudge a trust-estate for expenses decerned for against the trustees in a litigation in which the trust-estate was alone concerned.

3. Poinding of the Ground.—This diligence is competent to real or heritable creditors only. It is not competent to creditors in possession, or to proprietors under an absolute disposition intended only as a security. It is competent to superiors for their feu-duties. Where the superior has divested himself of his superiority, he cannot poind for recovery of arrears of feu-duties due prior to his divestiture,—*Scottish Heritages Co.* v. *North British Property Investment Co.*, 1885, 12 R. 550.

The diligence attaches all moveables found on the ground of the subjects over which the security extends, except those belonging to strangers. Tenant's moveables to the value of the current term's rent unpaid, or the arrears due at the time, may be attached by it. The poinding creditor obtains no preference over moveables which have been removed prior to the petition, although the removal may have been wrongful,—*Urquhart* v. *Macleod's Trustees*, 1883, 10 R. 991,—nor over goods which are *bona fide* the property of a third party,—*Thomson* v. *Scoular*, 1882, 9 R. 430. Immediately the summons of poinding the ground is served, the heritable proprietor is interpelled from allowing others to acquire rights over the moveables on the subjects poinded,—*Lyons* v. *Anderson, &c.*, 1880, 8 R. 24.

It is competent to poind in security for interest current but not yet due, but payment cannot be demanded till the stipulated term arrives,—*Stewart* v. *Gibson's Trustees*, 1880, 8 R. 270.

The diligence is obtained in the Court of Session by raising a summons against the proprietor, narrating the heritable bond or other ground of debt, and concluding that letters should be directed to messengers-at-arms, charging them to search for and poind the defender's moveables, and those of the tenant to the extent of the rent for the current term. Letters of poinding the ground are then obtained upon the decree. An action of poinding of the ground may also be raised in the Sheriff Court, and this is the usual practice. As a rule, the Sheriff grants instant warrant to poind the articles.

Under this diligence heritable creditors may obtain a preference to all the moveables on the ground belonging to the debtor. The effect of this diligence in competition with sequestration has varied considerably under different statutes. As the law now stands (see Conveyancing Act, 1874, sec. 55, and Amendment Act, 1879, secs. 3 and 4), no poinding of the ground, which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, is available in any question with the trustee; but a creditor, having a security preferable to the right of the trustee, may poind after the sequestration, but only to the effect of recovering the interest on the debt for the current half-year, and one year's arrears. The Companies Act, 1886, section 3, extends this provision to the case of the winding up of a company, and 50 and 51 Vict. c. 69, section 2, makes it applicable to all poindings of the ground by which moveables forming part of or belonging to a bankrupt estate, whether administered in Scotland or furth thereof, are sought to be attached or affected, and that whether the debts or securities, in respect of which such poindings are brought, are constituted or granted by the bankrupt, or by his ancestor or predecessor, or by any other person. The holder of a ground-annual has been held to come under the provision,—*Bell's Trustees* v. *Copland*, 1896, 23 R. 650.

As already stated, this diligence is not available to a creditor whose security is constituted by an absolute convey-

ance with back-letter, he being *ex facie* proprietor of the subjects. A real poinder is preferable to a personal poinder, and will not lose his preference unless a sale takes place under the personal poinding before an action of poinding the ground is served.

A creditor may use simultaneously all the available forms of diligence for the recovery of the same debt.

CHAPTER XV.

NOTOUR BANKRUPTCY, INSOLVENCY, AND PREFERENCES TO CREDITORS.

I.—*Notour Bankruptcy.*

INSOLVENCY is of two kinds—(1) practical, which arises when a person is unable to meet his current obligations when these become due; (2) absolute, when a person's liabilities exceed the value of his assets. Notour bankruptcy is practical insolvency made public.

It has always been the aim of the Courts of law to prevent gratuitous alienations of their property by debtors—insolvent in an absolute sense—to conjunct and confident persons, as well as to prevent unfair preferences being given to favourite creditors by debtors on the eve of bankruptcy. Such alienations, even to strangers, were reducible at common law, but it was no easy matter by the aid of that law to detect and expose the many complicated frauds which were found to be carried on by unprincipled bankrupts. The Parliament of Scotland, by their Act of 1621, c. 18, interposed a partial remedy for the evils then existing connected with insolvency. The Legislature, on the reports of the Lords of Session that the "fraude, malice, and falsehood of a number of dyvours and bankrupts is become so frequent and avowed, and hath already taken such progresse, to the overthrow of many honest men's fortunes and estates, that it is likely to dissolve trust, commerce, and faithful dealings amongst subjects," passed that statute to enable the creditors of an insolvent to reduce gratuitous alienations of his property to conjunct and confident persons, made while he knew himself to be bankrupt. This Act, on the face of it, is merely declaratory

of the common law, but the Court in applying it have given the creditors the benefit of certain valuable presumptions (see *infra*). This statutory remedy, however, proved to be insufficient for checking the evils referred to, in consequence of the Act not giving any definite description of bankruptcy, and of its not fixing the date to which the retrospective effect of it should be carried. Accordingly, a further remedy was interposed by the Act of the Scottish Parliament 1696, c. 5. This Act contained a definition of notour bankruptcy, or public insolvency, and fixed sixty days as the period to which notour bankruptcy should have retrospective effect as regards preferences to creditors. In the case of *Teenan's Trustees* v. *Teenan*, 1886, 13 R. 833, it was held that insolvency in the sense of the Act 1696, c. 5, was commercial insolvency or inability to meet current obligations when they became due, although the debtor's assets might be sufficient for the ultimate payment of his debts, *i.e.*, practical insolvency. The proofs of notour bankruptcy were enlarged by the subsequent Bankrupt Acts, and are now regulated by the Bankruptcy (Scotland) Act, 1856, and the Debtors (Scotland) Act, 1880.

The 7th section of the Bankruptcy Act enacts that notour bankruptcy shall be constituted by the following circumstances :—

1*st*, By Sequestration; or by the issuing of an adjudication of bankruptcy in England or Ireland.

2*nd*, By Insolvency; concurring (1) with a duly executed charge for payment; followed, where imprisonment is competent, by imprisonment or formal and regular apprehension of the debtor; or by his flight or absconding from diligence, or retreat to the sanctuary, or forcible defending of his person against diligence; or, where imprisonment is incompetent or impossible, by execution of arrestment of any of the debtor's effects, not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security; or (2) with sale of any effects belonging to the debtor under a poinding, or under a sequestration for rent; or with his

retiring to the sanctuary for twenty-four hours; or with his making application for the benefit of *cessio bonorum*.

By the Debtors (Scotland) Act, 1880, and the Civil Imprisonment (Scotland) Act, 1882, imprisonment for debt is abolished, except for taxes, fines, &c. due to the Crown, local rates and assessments, and sums decerned for aliment; but it is provided by section 6 of the Debtors Act that in any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency, concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening, prior to execution without payment having been made. Nothing in this section affects the provisions of section 7 of the Bankruptcy Act. It is to be kept in view that before 1880 imprisonment was not competent for a debt below £8 : 6 : 8; and that certain privileged persons could not be imprisoned. In these cases, therefore, the debtor must still be rendered notour bankrupt in one or other of the forms indicated by section 7.

In *Black* v. *Watson*, 1881, 9 R. 167, it was held that the provisions in section 7 of the Act of 1856, requiring a charge to be followed by arrestment, poinding, or adjudication, in cases in which imprisonment was incompetent or impossible, did not apply to cases where imprisonment was only rendered incompetent by the Act of 1880. See also, as to the construction of the two Acts, *Macrae* v. *Sutherland*, 1889, 16 R. 476, where Lord President Inglis says that the Act of 1880 extends the modes of constituting notour bankruptcy, just because it removes the mode of constituting it by imprisonment. Section 6 is intended solely for the purposes of the Act in which it occurs. "It is such notour bankruptcy as will enable a debtor or creditor to sue out a cessio, and I do not think the law relating to notour bankruptcy was intended to be altered for any other object."

Section 8 of the Bankruptcy Act provides that notour bankruptcy of a company may be constituted in any of the ways indicated in section 7, or by any of the partners being rendered notour bankrupt for a company debt. In *Stewart's Trustees* v. *Salvesen*, 1900, 2 F. 983, it was held that the modes of constituting notour bankruptcy, introduced by section 6 of the Debtors Act, applies only to cases in which imprisonment was rendered incompetent under that Act. It did not apply, therefore, to a company, which, *sua natura*, could not be imprisoned.

Notour bankruptcy commences from the time when its several requisites concur. When once constituted, it continues, in case of a sequestration, until the debtor is discharged, and in other cases until insolvency ceases; but it may be constituted anew within such period.

Effect of Notour Bankruptcy.—The 12th section of the Bankruptcy Act provides that all arrestments and poindings, not including poinding of the ground, used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall rank *pari passu*, as if they had all been used of the same date. But if any of the competing arrestments be used on the dependence of an action, they "must be followed up without undue delay;" which means that the debt must be constituted with all speed. (As to unpaid seller's rights see the Sale of Goods Act, 1893, section 40.) It is also provided by the Act of 1856 that creditors producing, in a process relative to the subject of a prior arrestment or poinding, liquid grounds of debt, or a decree of payment, shall be entitled to rank as if they had executed an arrestment or poinding. And if any arresting or poinding creditor shall, by means of his diligence, recover payment, he shall be accountable for the sum recovered, under deduction of expenses, to any creditor who may have a *pari passu* right to a ranking on the fund; and shall be liable to an action, at the instance of such creditor, for a proportional part of the sum so recovered. Under the Act (sec. 5) periods of time are reckoned "exclusive of the day from which such

period is directed to run,"—*Stevin* v. *Reynolds and Co.*, 1891, 18 R. 422.

The provisions of the Bankruptcy Act, so far as regards the effect of notour bankruptcy, merely regulate the *pari passu* ranking of arrestments and poindings executed within sixty days of its constitution. The Act does not deal with preferences given by the bankrupt to creditors, or voluntary alienations of his property to conjunct and confident persons. All questions relating to such transactions fall to be determined according to the Acts of the Scottish Parliament before referred to, as interpreted by the numerous decisions of the Court to which they have given rise. These transactions now fall to be considered.

II.—*Alienations by Insolvent Persons.*

Act 1621, c. 18.—The object of this statute was to enable individual creditors to reduce all conveyances or alienations of property, heritable or moveable, made after contracting lawful debts by an insolvent debtor to any conjunct or confident person, without any necessary cause, and without a price paid.

It has been settled that the process of reduction is open to a prior creditor. It would seem that a posterior creditor can only challenge at common law. A trustee on a sequestrated estate can challenge whether there are prior creditors or not. A trustee under a cessio can only challenge if there be prior creditors ranked on the estate. If the challenger prove that the person who has received the alienation is a conjunct or confident person, and that the granter is insolvent at the date of challenge, the Court holds that presumptions are set up that the granter was insolvent at the date of the alienation, and that it was gratuitous; and unless the recipient discharges the owners of proving either that the granter was solvent at the date of alienation, or that value was given for it, the deed falls to be reduced. Actions of reduction under this statute are quite competent, even though more than sixty days may have elapsed betwixt the date of the alienation and notour bankruptcy, this limita-

tion being applicable only under the Act of 1696 in the case of parties who are *creditors*, and who may have received the conveyance by way of security for their debts.

The alienations struck at by the Act comprehend the whole of the debtor's heritable and moveable property, and include bills and postnuptial provisions to wives and children. It has been noticed that under the Married Women's Policies of Assurance Act, 1880, a policy of assurance on a husband's life, if *ex facie* expressed to be for the benefit of his wife or children, is not liable to the diligence of his creditors or reducible on his insolvency. Antenuptial provisions are not struck at, such being deemed onerous.

The party to whom the alienation is made must be proved to be "a conjunct or confident person." A "conjunct" person has been held to be one related to the debtor, as parent, child, brother or sister, uncle or aunt, nephew or niece, and the like relations by affinity, *i.e.*, marriage, except uncle or aunt, and nephew or niece. A "confident" person is one who stands in a confidential relation, such as master, servant, guardian, or ward, &c.; but it is always a question of circumstances as to whether such relationship exists.

The deed must have been granted gratuitously,—that is, without an onerous consideration or price paid. If the grantee in the deed be a creditor of the granter, even for a less sum than the value of the subject conveyed, the Act will not apply to the transaction. Nor will it apply to a deed executed by the granter in fulfilment of a previous obligation. The mode of proof is not limited, as might seem from the words of the Act, to the "writ or oath of the party receiver," but all the channels of evidence are open to the challenger. In *Dawson* v. *Thorburn*, 1888, 15 R. 1891, a disposition by an insolvent father to his daughter, in consideration of fifteen years' service as his housekeeper, was held struck at by the Act, the daughter having failed to prove that the disposition was for a just and necessary cause, there being no contract established to pay wages, and no relationship of debtor and creditor between them;

see also *Tennant* v. *Miller*, 1897, 4 S.L.T. 440. To entitle a trustee to the presumption of insolvency, he must represent creditors whose debts are prior to the date of the deed.

III.—*Preferences to Creditors falling within the Act* 1696, *c.* 5.

The object of this Act is to reduce all preferences given to particular creditors within sixty days of notour bankruptcy. The Act declares to be "null and void" all "voluntary dispositions, assignations, or other deeds which shall be found to be made and granted, directly or indirectly," by a bankrupt, "either at or after his becoming bankrupt, or in the space of sixty days before, in favour of his creditor, either for his satisfaction or further security in preference to other creditors."

Much litigation has occurred as to what classes of transactions fall within the scope of the Act; and such of these as are of practical importance it will be proper to go over in detail. It may, however, be stated generally that if a debtor, within sixty days of notour bankruptcy, transfers to his creditor any of his property, heritable or moveable, in security of an old debt, or of a debt previously contracted, such security will be held to be a preference, and reducible under the Act.

Payments in Money.—The Act does not apply to payments in cash, or by a draft on a banker made or given to a creditor, nor does it apply to the indorsation to a creditor of a bank order, payable to the debtor or his order in payment of a debt already due, but indorsations of cheques will be reduced,—*Carter* v. *Johnstone*, 1886, 13 R. 698; *Anderson's Trustees* v. *Somerville and Co. Ltd.*, 1899, 1 F. 90. The payment must be *bona fide*, and in the ordinary course of business. Thus payments in advance of a debt not due at the time have been held out of the ordinary course of business, and reducible under the Act; such payments being looked on rather as deposits in security of the debt than as proper payments.—See *Rose* v. *Falconer*, 1868, 6 Macph. 960. Cash payments by an insolvent debtor to a

creditor are effectual if not made fraudulently, although both creditor and debtor are aware that the debtor is at the time insolvent,—*Coutts' Trustees and Doe* v. *Webster*, 1886, 13 R. 1112.

Bills.—It has been decided that bills indorsed by a debtor to his creditor within sixty days of bankruptcy, in security of a prior debt, fall within the operation of the Act. But a distinction has been made between bills indorsed by a debtor to a creditor avowedly to provide for a debt previously incurred, and bills indorsed by a mercantile man to his banker or money agent in the usual course of trade. In the old case of *Sir William Forbes and Co.*, 1st March 1791, the Act was found inapplicable to a series of bill transactions on a running account occurring within sixty days of bankruptcy; and the principles of this decision were followed in two subsequent cases—the one having reference to an account between an insurance company and its agents, and the other to an account between underwriters and an insurance broker.

The question again came up with reference to banking transactions in the case of *Blincow's Trustee* v. *Allan and Co.*, 3rd December 1828 and 22nd January 1831, affirmed on appeal, 1833, 7 W. & S. 57, when the principle was approved that bills and drafts indorsed to a banker in the usual course of business did not fall within the scope of the Act. It was observed by Lord Newton, Ordinary, that "had the defenders not been the bankrupt's ordinary bankers, with whom he was in use to discount bills, there would have been little doubt that the transaction, although in the form of a discounting of the bills, and an application of the proceeds by the order of the bankrupt to the payment of his debt, would have been reducible, as falling under the spirit of the Act. It is said, however, by the defenders, that, being his ordinary bankers, they discounted the bills in question in the course of trade, and only applied the balance which stood in his favour on their running account to the payment of the instalment of the bond, in consequence of

his order to that effect." Lord Balgray remarked: "A banker is entitled, in the ordinary course of business, to discount a bill, either by means of cash, or giving credit to the last hour previous to a person's avowed bankruptcy, provided it is done fairly and without reference to any unlawful object. So far, therefore, as relates to the discounting of the bills in question, and placing the proceeds to the credit of the bankrupt, it is clear that no objections can be made."

The above case, it will be observed, refers to bills discounted, the proceeds of which were placed to the credit of the bankrupt. But the same principle would regulate any question of preference in regard to bills indorsed to a banker in the usual course of business, to lie over till maturity, and the proceeds then to be placed to the customer's credit. In the case of *Sir William Forbes*, before referred to, paper of this description was held not to be struck at by the Act. If, however, the bills are indorsed, not in the usual course of business, but for the express purpose of affording a specific security for a prior debt, such a transaction will come within the Act. It is always a question of fact, and for a jury to determine, whether or not bills are indorsed in the usual course of business.

In the case of *Horsburgh* v. *Ramsay and Co.*, 1885, 12 R. 1171, an insolvent, who had for some years been paying his creditors in cash when he could, but frequently by the indorsation of bills received from customers, within sixty days of bankruptcy indorsed three bills not yet due, received for goods furnished. It was held that the indorsations were struck at by the Act of 1696, c. 5, not being "transactions in the ordinary course of trade," and therefore reducible.

Transfer of Moveables.—A deposit, or transfer of merchandise or other moveable property, in security of a prior debt, falls under the scope of the Act. In the case of *White* v. *Briggs*, 8th June 1843, 5 D. 1164, an example will be found of the reduction of an indorsation of a bill of lading for certain goods, and relative draft, transferred by the debtor to the

creditor within sixty days of bankruptcy. In the case of *Smith and Co.* v. *Smith*, 1889, 16 R. 392, where a firm within sixty days of their sequestration assigned their book debts to the amount of £387 in security of an immediate advance of £330, and in exchange for a bill for £57 : 15s. previously granted by them to the assignee, Lord Young expressed the opinion that this assignation was not struck at to the extent of £57 : 15s. by the Act 1696, c. 5.

Covert Sales.—There is nothing in the Act to prevent *bona fide* trading with a debtor up to the time of his legal bankruptcy; and the debtor may grant valid securities over his estate for cash presently advanced to him. But a sale designedly made by a debtor to his creditor, for the purpose of enabling the latter to plead compensation of the price with his debt or extinguishing so much of it, is reducible as a preference. In order, however, to reduce a sale of this kind, it is necessary to prove collusion, and an intention on the part of the debtor to create a preference in favour of the creditor. But if there be a running account between the parties, and if the sale is made in the ordinary course of business, without any intention to create a preference, the transaction will not come within the Act.—(See the case of *Stiven* v. *Scott and Simpson*, 30th June 1871, 9 Macph. 923.) In the case of *M'Dougall's Trustees* v. *Gibbon*, 1889, 16 R. 740, an indirect preference to a creditor, under circumstances which seem very like an evasion of the statute, was upheld. The circumstances of this case were these: A., being indebted to B., granted along with a friend, C., who was aware of his insolvent condition, a promissory note to B. for the amount of the debt. Of the same date A. disposed in favour of C. certain heritable subjects by disposition *ex facie* absolute, but by back-letter declared to be in security merely of C. if he should be called to pay under the promissory note. A. was sequestrated within sixty days of this transaction. The trustee brought a reduction of the disposition on the ground that it conferred a preference on B. indirectly in contravention of

the Act 1696, c. 5, but did not conclude for reduction of the promissory note, nor call B. as a defender. It was held (*diss.* Lord Lee) that, looking to the transaction between A. and C. alone, there was no ground for reduction under the Act 1696, as C. was not a prior creditor of A., and that, as B. was not called as a party to the action, the transaction as a whole could not be considered.

In reductions under this Act it is not necessary to prove that the creditor was in knowledge of the debtor's bankruptcy, or that he was guilty of fraud in accepting the security.

The securities which are struck at by this Act and section 110 of the Bankruptcy Act, 1856, are securities created by some act or deed of the bankrupt or deceased debtor, and those provisions do not apply where it is the creditor who has rendered the securities effectual,—*Scottish Provident Institution* v. *Cohen and Co.*, 1888, 16 R. 112.

IV.—*Transactions begun before but completed within Sixty Days of Bankruptcy.*

Numerous questions have arisen as to transactions begun before but not completed till the sixty days had begun to run. Such questions depend very much upon the circumstances of the particular case; but certain rules, of general application, have been fixed in regard to such transactions.

1. A security for a *prior* debt, granted previous to the commencement of the sixty days, but not completed by registration, intimation, or possession, as the case may be, till they had begun to run, is struck at by the Act. An exception to this is in the case of a security taken by arrestment on dependence of an action, where a preference is conferred although the debtor be sequestrated before decree is obtained in the action, provided it be followed up without undue delay,—*Mitchell* v. *Scott*, 1881, 8 R. 875.

2. The statute does not apply to deeds of security for a

present advance, granted before the sixty days, although the deed be registered or intimated within the sixty days.

3. Neither does it apply to acts done within sixty days of bankruptcy, in specific implement of a previous onerous contract; nor to securities granted within the sixty days, provided it was expressly stipulated, at the time when the debt was contracted, that the particular security so granted should be given by the debtor to the creditor as the counterpart of the transaction.

This rule may be illustrated by the following cases decided by the Court:—

Bank of Scotland v. *Stewart and Ross*, 7th February 1811, F.C.—In this case an agent of the bank advanced money on heritable security, and, at the time of making the advance, the titles were delivered to him, in order that the security might be completed. Some delay took place in making up the title, which brought the security within sixty days of bankruptcy; but the Court held the incidental delay not to be fatal to the security.

In the case of *Anderson* v. *Walker*, March and July 1842, 4 D. 1180, Smith granted a heritable bond to Walker, as for a loan of £1300. Smith was sequestrated thirteen days after the date of the bond. It was proved that the advance was made by Walker, who was a bank agent, previous to the date of the bond, on an overdrawn current account, but that it was expressly stipulated and agreed upon at the time, as a counterpart of the transaction, that Smith should give heritable security for whatever sums Walker should advance. It was held that the security did not come within the Act. The Lord Justice-Clerk remarked that "ever since the celebrated case in which Lord President Blair delivered his opinion [the above case of *Bank of Scotland* v. *Stewart*], it has been held that if the money was advanced on a stipulation for a certain definite security, that security will be good, though only completed subsequently and within sixty days of bankruptcy, if the stipulation be proved in any way."

The same principle was again affirmed in the later case of

Taylor v. *Farrie*, 1855, 17 D. 639. Here A., sixty-one days before bankruptcy, sold to Farrie his stock in trade, &c., and received payment of the price. Possession was taken by Farrie three days afterwards. In an action of reduction, the Court, on the ground that there was no fraud, and that the acts done within sixty days of bankruptcy were not voluntary, but only in specific implement of a previous contract, held that the transaction was not reducible. See also *Cowdenbeath Coal Co.* v. *Clydesdale Bank*, 1895, 22 R. 682, where a bill of lading was given in security of an advance within the sixty days, it was held that the security had been granted in implement of an obligation for a present advance and not for a prior debt, and was therefore not reducible.

4. If a transaction be entered into on a promise or obligation to grant a security at an indefinite future time, such security is reducible if completed within the sixty days.

This point came up before the Court in the case of *Moncrieff* v. *Hay*, 1851, 14 D. 200. Here the Union Bank advanced to Tod and Hill £3000 upon their promissory note, and the deposit of certain securities, accompanied by a letter binding the parties, "at any time when required," to grant a conveyance of the securities. Six days before bankruptcy a conveyance was granted to the bank. The assignation was reduced on the ground that the letter of obligation did not import a present security, but was a mere promise to give security at a future time. The reduction of such a security, however, would not destroy any right of lien which the bank had over the securities deposited with them.

In *Gourlay* v. *Mackie*, 1887, 14 R. 403, a firm within sixty days of bankruptcy obtained a loan from another firm, to whom they granted a promissory note and this letter:—"On consideration of you having this day discounted for our sole benefit our acceptance at four months from date for £462 : 10s., and handed us proceeds of same, we hereby hand over to you, as security for same, one hundred shares of £6 paid in Holmes

Oil Company, and bind ourselves to transfer same to you at any time during the currency of the bill, if you desire it." The certificate of the shares was at the same time delivered to the lenders. A transfer was executed three weeks thereafter, and fourteen days before the sequestration of the granters. It was held that the transfer was reducible under the Act. In this case Lord Young remarked that "where the stipulation is not for a simultaneous security, but that the debtor shall give security, and I do not care whether it is general or over a particular subject, whenever the creditor sees it is his interest to demand it, that is . . . a device to evade the operation of the statute,"—p. 410.

In *Stiven* v. *Scott and Simpson*, 1871, 9 Macph. 923, to which we have already referred, it was held that, where a firm of merchants obtained the signature of another firm to a series of accommodation bills, and gave the acceptors invoices of sales of goods retained in the drawer's possession, and partly delivered within sixty days of bankruptcy, such delivery was reducible under the Act 1696, and the goods belonged to the bankrupt estate. If there is an obligation in the contract to give security generally, even although within a definite time, the transaction is not a *novum debitum*, and is struck at by the Act. Thus in *Gourlay* v. *Hodge*, 1875, 2 R. 738, delivery of goods under the following document was reduced, such delivery having taken place within sixty days of bankruptcy:—"We have this day received from you £500; and we hereby promise to give you, within one month from this date, delivery orders on stores in Glasgow for wheat, oats, beans, or Indian corn, to the full value of £500." In this case the delivery took place within the specified month.

As already observed, the securities which are struck at by the Act 1696, c. 5, and section 110 of the Bankruptcy (Scotland) Act, 1856, are securities created by some act or deed of the bankrupt, and these provisions do not apply where it is the creditor who has rendered the securities effectual.

The still more recent case of *Paterson's Trustee* v. *Paterson's*

Trustees, 1891, 19 R. 91, further exemplifies the application of the principle involved in the above cases.

These decisions contain the latest and most authoritative expositions of the present state of the law on this difficult subject, and may be referred to for the particulars of all the leading cases bearing on the point.

It is no illegality in a creditor, even within sixty days of his debtor's bankruptcy, to take a guarantee for his debt from a third party; and it does not make the transaction illegal that this third party happens to be a debtor to the bankrupt.

CHAPTER XVI.

SEQUESTRATION UNDER THE BANKRUPT ACT.

It is proposed in this chapter to advert to the law of bankruptcy so far only as it may have a practical bearing on the object of this work.

Sequestration is a judicial process, by which the effects of a bankrupt may be realised and equitably distributed among his creditors. The process may be raised either in the Supreme or the Sheriff Court. It is competent to present a petition to the Court of Session notwithstanding the refusal of sequestration by the Sheriff.

In Scotland the realisation and distribution of the bankrupt's estate is accomplished through a trustee, elected by the general body of creditors, in whom the estates of the bankrupt, both heritable and moveable, become vested. (See, however, the case of *The Heritable Reversionary Co. Ltd.* v. *Millar* (*M'Kay's Trustee*), 1892, 19 R. (H.L.) 43, where it was held that heritable property to which the bankrupt has an unqualified feudal title, but which he holds in trust for another, is not his property in the sense of the Act (1856, sec. 102), and does not vest in his trustee.) The trustee takes the bankrupt's heritable property *tantum tale* as it stands in the Register of Sasines. The trustee is advised and assisted in his duties by three commissioners, also elected by the creditors from their own number. The trustee has the sole charge and control of the estate, and has a discretionary power as to the time and manner of realising it. He likewise judges of the claims of creditors, and admits, modifies, or rejects them as he may see cause; the creditors having, however, a right of appeal to the Courts of law against his judgment.

The bankruptcy law of Scotland is now regulated by the Bankruptcy (Scotland) Act, 1856, the Bankruptcy and Real Securities (Scotland) Act, 1857, the Bankruptcy (Scotland) Amendment Act, 1860, the Act 38 and 39 Vict. c. 26, 29th June 1875, the Debtors (Scotland) Act, 1880, the Bankruptcy and Cessio (Scotland) Act, 1881, and the Judicial Factors (Scotland) Act, 1889.

Under these Acts sequestration may be awarded of the estates of any living debtor who is subject to the jurisdiction of the Supreme Courts of Scotland, whether engaged in mercantile business or not. The application for sequestration may be made by the debtor himself, with concurrence of a creditor whose debt amounts to not less than £50; or of any two creditors whose debts together amount to not less than £70; or of any three or more creditors whose debts together amount to not less than £100.

The estates of a debtor may be sequestrated without his concurrence, on a petition being presented by one or more creditors, qualified as above mentioned, provided that the debtor is notour bankrupt, that the petition be presented within four months of the date of notour bankruptcy, and that the debtor has resided or had a dwelling-house or place of business in Scotland within a year before the date of presenting the petition. It is no objection to sequestration being awarded that the debtor has been made notour bankrupt more than four months before, if he be again made notour bankrupt within four months of the presentation of the petition,—*Balfour* v. *Pedie*, 1841, 3 D. 612; *Wood* v. *Cranston and Elliot*, 1891, 18 R. 382; and Bankruptcy Act, 1856, section 9. Should the petitioning creditor withdraw from the sequestration, another creditor may be sisted, and the Court will on his petition appoint the sequestration to proceed as if it had been of new awarded,—*Forsyth*, 1883, 10 R. 1061.

The estates of a company may in like manner be sequestrated either with or without their concurrence. It is incompetent to sequestrate under the Bankruptcy Acts a company

registered under the Companies Acts; the process in this case must be one of winding up as provided by the Companies Acts, —*Standard Property Investment Co.* v. *Dunblane Hydropathic Co.*, 1884, 12 R. 328. In this case distinctions are brought out between liquidation and sequestration. A company may, however, be made notour bankrupt to the effect of equalising diligences,—*Clarke* v. *Hinde, Milne, and Co.*, 1884, 12 R. 347.

Sequestration of the estates of a debtor deceased is also competent, provided that, at the time of his death, he was subject to the jurisdiction of the Supreme Courts. The petition may be presented by a mandatory of the creditor, duly authorised to apply for sequestration, or by a creditor or creditors qualified as above. The petition may be presented at any time, but sequestration cannot be awarded until the lapse of six months rom the debtor's decease, unless he was notour bankrupt at the time of his death, or unless his representatives concur in the application, or renounce the succession, in which cases sequestration is immediately awarded.

In the interlocutor awarding sequestration the judge appoints a meeting of creditors to be held on a specified day, in a specified place, for the purpose of electing a trustee and commissioners, of which meeting notice is given in the *Edinburgh Gazette*. This meeting must be held within twelve days of such notice, but of these days six must have elapsed. An adjourned meeting may be held within the twelve days.

Claims for Voting.—The validity of a creditor's vote in the election of a trustee, or in any question relating to the administration of the estate, depends upon his claim being prepared in terms of the 1856 Act. Though the general principles by which the votes of creditors are regulated are by no means hard to understand, yet much litigation has arisen from the lodging of defectively prepared claims.

The right of voting is limited by the statute to the actual amount of the creditor's interest in the estate. It is only, however, in cases where the creditor holds security over the estate

of the bankrupt, or where he holds other obligants who are liable in relief to the bankrupt, that there is any peculiarity in the claim. If the bankrupt is the sole obligant for the debt, or if he is the *real* debtor, and the creditor holds no security, there is no peculiarity in the claim for voting.

The first matter calling for notice is the form of the oath.

The 22nd section of the Act contains general directions as to the oath to be taken by creditors resident within the kingdom, which are applicable to the cases of voting and ranking, as well as of the concurring creditors.

It provides that the oath by a creditor "shall be taken by him before a Judge Ordinary, Magistrate, or Justice of the Peace, to the verity of the debt claimed by him; and he shall in such oath state what other persons, if any, are, besides the bankrupt, liable for the debt or any part thereof, and specify any securities which he holds over the estate of the bankrupt, or of other obligants; and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect."

Where the creditor is a corporation, the oath may be taken by a secretary, manager, cashier, clerk, or other principal officer of such corporation, although not a member thereof; or, in case of other companies, such as a bank not incorporated, an oath by a partner is sufficient; and where any creditor is under age, or incapable, an oath of credulity by his authorised agent, factor, guardian, or manager, is sufficient (sec. 25). It has been decided that the oath where taken by an agent for a bank is bad; on the other hand, the oath of an assistant manager has been held to be good. It is most important that the oath should be taken conform to the Act. In the case of *Blair* v. *The North British and Mercantile Insurance Co.*, 1889, 16 R. 325, sequestration was recalled on its being proved that the oath was irregular, though the irregularity did not appear *ex facie* of the proceedings.

To entitle a creditor to vote, he must produce with his oath

the vouchers necessary to prove the debt. The sum due to a bank on a bond of credit is sufficiently vouched by production of the bond, and an account signed or certified as there provided. But for overdrafts a detailed account must be produced along with the relative cheques. An open account should in no case start with a balance due on a previous account, unless it can be vouched by a docquet. In *Low* v. *Baxter*, 1851, 13 D. 1349, a vote on that account beginning "By balance in bank on current deposit, £4 : 9 : 10," was rejected, no voucher of the balance having been produced. A diligence may be granted for the recovery of documents or vouchers, which will instantly verify objections to claims for votes, but where such instant proof is not available, it is incompetent to allow a proof at large in support of an objection to the validity of votes in the election of a trustee,—*Gillon* v. *Caesar*, 1882, 10 R. 59; and *Reid* v. *Strathie*, 1887, 14 R. 847.

Where the claimant is a conjunct person with the bankrupt, the vouchers produced will be very narrowly examined,—*Witham* v. *Teenan's Trustees*, 1884, 11 R. 776.

The creditor is entitled to vote and rank for the accumulated amount of principal and interest to the date of the sequestration, but not for interest accruing thereafter. If the debt is not payable till after the date of sequestration, the creditor is bound to deduct interest from that date to the date of payment, and if his claim is, by the usage of trade applicable to it, liable to deduction of any discount beyond legal interest, he is bound to deduct such discount. It is not necessary to specify *separately* in the oath or claim the principal and interest, it being sufficient at once to state the amount of the debt (sec. 52). Sums received by the creditor after the date of sequestration from co-obligants do not fall to be deducted from the claim, though they must be stated in the affidavit for the information of the trustee.

If the claim depends on a contingency, or is for an annuity, the creditor may apply to the Sheriff, if the trustee has not been elected, or, if elected, to the trustee, to put a value on such

claim; and on such value being fixed, the creditor is entitled to vote and draw dividends in respect of such value, and no more. If the creditor is dissatisfied with the valuation, he may appeal to the Courts of law (secs. 53 and 54). The creditor in a contingent debt cannot vote or draw a dividend until his debt be valued; but he may have a dividend set aside, to abide the happening of the event.

If the claim of a creditor is not framed in terms of the Act, the trustee is directed, by the 51st section, to call upon him to rectify it, and to point out wherein it is defective; and unless the alteration is made, the claim is to be disallowed or rejected. This provision was introduced with the view of putting a stop to litigation on points of form.

When a creditor has an obligant bound to him along with the bankrupt for the debt, such obligant is not freed from his liability because of any vote given or dividend drawn by the creditor, or of his assenting to the discharge of the bankrupt, or to any composition (sec. 56). This renders it unnecessary for creditors to obtain the written consent of co-obligants to their acting in the sequestration as they may judge best.

The 57th section exempts creditors who have lodged claims from all liability for expenses incurred by the trustee, even though the estate should not be sufficient to reimburse him.

The following are the sections of the Act embodying the special rules as to *voting*:—

Section 59.—"If a creditor holds a security for his debt over any part of the estate of the bankrupt, he shall, before *voting*, make an oath, in which he shall put a specified value on such security, and deduct such value from his debt, and specify the balance, and if the estate over which the security extends be sold, he shall specify in his oath the free proceeds which he has received, or shall be entitled to receive therefrom, and specify the balance due after deduction thereof, and he shall be entitled in any case to vote in respect of the balance, and no

more, without prejudice to the amount of his debt in other respects; and in questions as to the disposal or management of the estate, subject to his security, he shall be entitled to vote as a creditor for the full amount of his debt, without making any such deduction."

Section 60.—"When a creditor has an obligant bound with but liable in relief to the bankrupt, or holds any security from an obligant liable in relief to the bankrupt, or any security from which the bankrupt has a right of relief, such creditor shall, before *voting*, make an oath in which he shall put a specified value on the obligation of such obligant, and on such security to the extent to which the bankrupt is entitled to relief, and he shall deduct such value from his debt, and specify the balance, and he shall be entitled to vote in respect of such balance, and no more, without prejudice to the amount of his debt in other respects."

Section 61.—"A creditor on the estate of a company shall not be bound, for the purpose of *voting* on the company's estate, to deduct from his claim the value which he may be entitled to draw from the estates of the partners; but if he claim on the estate of a partner, he shall, before voting, in his oath put a specified value on his claim against the estate of the company, and also against the other partners thereof, in so far as they are liable to relieve such partner, and deduct such value from his debt, and specify the balance, and he shall be entitled to vote as a creditor for the said balance, and no more, without prejudice to the amount of his debt in other respects."

A few observations may be given in explanation of these sections.

The first point to be noticed is the case of a creditor who holds security for his debt. Although the creditor, in his affidavit, requires to specify *all* securities held by him, it is only

securities *over the estate of the bankrupt* that fall to be deducted from his debt, whether in ranking or in voting. For example, if the *bankrupt* conveyed to the creditor a house, or a life policy, or indorsed bills in security of his debt, the value of such security requires to be deducted in voting, or in ranking upon his estate; but if the same or a similar security was given to the creditor, not by the bankrupt, but by a *surety* or *co-obligant*, it does not require to be valued and deducted, as it forms no part of the estate of the bankrupt. All that is required in such a case is, that the security be specified in the affidavit for the information of the trustee. A secured creditor who has valued and deducted his security and been ranked for the balance, is not thereby precluded from revaluing the security in claiming for a second dividend,—*Commercial Bank of Scotland Ltd.* v. *Speedie's Trustees*, 1885, 13 R. 257.

The next case is that of a creditor holding an obligant bound for the debt who is liable in *relief* to the bankrupt. In this case, the creditor's right of voting is limited to his true interest in the estate. For example, if the drawer of a bill becomes bankrupt, the holder must, before voting on his estate, value the obligation of the acceptor, who is the true debtor, and liable to relieve the drawer. If the acceptor be quite good for the bill, it is evident that the holder has no interest in the management of the drawer's estate; and in such case he would have no vote. If, however, the acceptor is insolvent or unable to pay the bill, the holder, on deducting the value of his obligation, and of any security granted by him, will have a vote for the balance.

If a surety for a cash-account becomes bankrupt, the bank will have no vote on the surety's estate, unless the principal obligant, for whose benefit the credit was granted, is insolvent or unable to pay it. The principal being bound to relieve the surety, the bank must value his obligation; and, if the principal is well able to pay the debt, the bank cannot with safety value it at a less sum than its true amount, and they have no interest in the administration of the surety's estate. This rule

however, is applicable only to the case of voting, and does not apply, as we shall afterwards see, to a claim for *ranking*. In the case of *Gordon* v. *M'Gubbin*, 1851, 13 D. 1154, it was held that the holder could not vote on the estate of the drawer of bills *current* at the date of the sequestration, on the ground that they might be paid by the acceptor at maturity. If, however, the acceptor is bankrupt or insolvent, and the creditor depones to that effect, the vote will be sustained. Where bills have been drawn against goods in the acceptor's hands, and both drawer and acceptor have failed while the bills are in the circle, the holder of the bill cannot claim to have the goods applied in payment of the bills, but must rank on the estates of the drawer and acceptor as an ordinary creditor, and while the acceptor's estate will be entitled to relief and indemnification out of the value of the goods for all dividends paid in respect of the bills, the drawer's estate will have right to the balance of the goods after such indemnity has been given,—*The Royal Bank of Scotland* v. *Saunders and Son's Trustees*, 1882, 9 R. (H.L.) 67. In this case it was held that the English rule (see *ex parte Waring*, 19 Vesey, 345, and 2 Rose, 182) is inapplicable in Scotland.

Claim on a Company Estate and Partners.—On the sequestration of a firm, the funds and property of the company and of individual partners being separate and distinct estates, the claims of creditors are dealt with according as they may form debts against the company or against the individual partners. The private creditors of a partner of a firm have no right to vote or rank on the company estate, unless a surplus emerge after the company's debts are paid, but the creditors of the company have a right to vote and rank, not only on the company's estate, but on the partners' estates as well. The creditor of a firm may vote on the company estate, without deducting the value of his claim against the partners, but if he claims to vote on the estate of a partner, he must deduct from the amount of his debt the value of his claim against the company

estate and the other individual partners so far as liable in relief. Thus, if a creditor has a debt, say of £500, against a company consisting of two partners, and wishes to vote on the estate of the partners, his voting claims will be made up as follows :—

His vote on the company estate will be for the full amount of his debt. But the company estate being liable in total relief to the individual partners, and the one partner being liable in relief to the other to the extent of one-half of the balance, after deducting the value of the claim against the company, the vote on the estates of the individual partners, supposing the company's estate to yield 5s. in the pound, and the estates of the partners to yield 1s. each, would stand thus :—

Amount of debt, ...	£500	0	0
Value of claim against company, ...	125	0	0
Balance, ...	£375	0	0
Value of claim against copartner in so far as he is liable in relief (being one-half of above balance at 1s. per pound), ...	9	7	6
Voting claim on each of the individual partners' estate, ...	£365	12	6

If a partner of a company conveys his *private* property to a creditor in security of a *company* debt, the creditor is not bound to deduct the value of such security in voting or ranking on the *company* estate ; but in voting or ranking on the estate of that partner the security falls to be deducted in the claim.

In order to prevent securities and collateral obligations from being undervalued, the 62nd section of the Act provides that the trustee, with consent of the commissioners, within two months after the claim has been made use of in voting, or the majority of creditors at any meeting assembled, during such meeting, may require any creditor holding a security for his debt over any part of the estate of the bankrupt, or any obligation or security from an obligant liable in relief to the bankrupt,

to assign it to the trustee at the expense of the estate, on payment of the specified value, with 20 per cent. in addition to such value. The payment of 20 per cent., in addition to the value put on the security, holds only in the case of voting. In a claim for *ranking*, the trustee may require a conveyance to the security or obligation as aforesaid, on payment of the value put on it on the creditor's oath. It is competent to the creditor, however, at any time before he has been called on to convey his security to the trustee, to withdraw his claim, and correct his valuation by a new oath.

Meetings of Creditors.—A majority in *value* of the creditors present at any meeting decide on all questions brought before it, except in special cases, the most important of which are as follows:—The removal, or acceptance of resignation of the trustee (in the case of *Dryborough* v. *Macdonald*, 1893, 20 R. 396, new trustees were appointed because delay had occurred in carrying through the sequestration proceedings); the bank in which the money of the estate is to be deposited; and the direction of criminal proceedings against the bankrupt—all require a majority, both in number and value, of the creditors present. A resolution to wind up under a deed of arrangement requires a majority in number and four-fifths in value. The entertaining of an offer of composition at the meeting for election of a trustee, and the acceptance of such offer, requires a majority in number and nine-tenths in value of the creditors assembled. The entertaining of an offer of composition made at the statutory meeting held after the bankrupt's examination, and the acceptance of such offer, requires a majority in number and four-fifths in value of the creditors present. The acceptance of any renewed offer requires a majority in number and nine-tenths in value of all the creditors who have produced oaths; and such meeting cannot be called by the trustee unless the offer has previously been entertained in writing by a majority of nine-tenths in number and value of all the creditors ranked or entitled to be ranked.

Special Rules as to Ranking for Payment of Dividends.

Section 65.—"To entitle any creditor, who holds a security over any part of the estate of the bankrupt to be ranked in order to draw a dividend, he shall on oath put a specified value on such security, and deduct such value from his debt, and specify the balance; and the trustee, with consent of the commissioners, shall be entitled to a conveyance or assignation of such security, at the expense of the estate, on payment of the value so specified out of the first of the common fund, or to reserve to such creditor the full benefit of such security; and in either case the creditor shall be ranked for and receive a dividend on the said balance, and no more, without prejudice to the amount of his debt in other respects."

The creditors should see that the trustee, in his deliverance, either demands a conveyance or assignation of the security, or reserves its full benefit to the creditor; for, if the security was, for example, a policy on the bankrupt's life, his death might raise some nice questions if the trustee's deliverance was not distinct.

Section 66.—"When a creditor claims on the estate of the partner of a company in respect of a debt due by such company, the trustee on the estate of such partner shall, before ranking such creditor, put a valuation on the estate of the company, and deduct from the claim of such creditor such estimated value, and rank and pay to him a dividend only on the balance."

It will be noticed that, in a claim of ranking for a dividend, a creditor holding a security over the estate of the bankrupt requires to deduct the value of it from his debt, and to specify the balance, on which alone he is entitled to receive a dividend. It is important to observe that the trustee is entitled to demand an assignation of the security, on payment of the sum specified as the value, without the additional 20 per cent. as in the case of voting. No time is specified within which the trustee is en-

titled to require an assignation, but if undue delay is allowed to take place, he will be held to have acquiesced in the creditor retaining the security. The creditor may sell the security, if entitled to do so, unless interpelled by the trustee, and is not bound to give notice of his intention to sell to the trustee,—*Henderson's Trustee* v. *Auld and Guild*, 1872, 10 Macph. 946.

Sometimes it has been found difficult to determine whether the security held is over the estate of the bankrupt, and requires to be deducted from the debt in ranking. Much of the difficulty will be removed by the application of this simple test, viz.—Does the property held in security belong to, and was it conveyed to the creditor by the bankrupt? If it belongs to or was conveyed by the bankrupt, then there is no doubt it is a security over his estate, and, as such, falls to be valued and deducted. If, on the other hand, the security belonged to and was conveyed to the creditor by a co-obligant, it does not require to be deducted, but merely stated in the affidavit for the information of the trustee.—(See *British Linen Company* v. *Gourlay*, 1877, 4 R. 651.)

In the case of a company, consisting of two or more partners, one of whom conveys to a creditor his *private* property in security of a *company* debt, the value of such security does not require to be deducted in ranking on the *company* estate, but falls to be deducted from the claim on the estate of the individual partner who conveyed it.

The following cases are useful illustrations of the difficulty, whether the security is actually over the bankrupt estate or not:—

A bank made advances to a firm on obtaining as security certain bonds (transferable by indorsation), belonging respectively to A. and B., two of the partners, by whom they were blank indorsed and delivered to the bank. Subsequently the firm acquired from A. his right to the bonds belonging to him. Thereafter, the firm, having become insolvent, granted a conveyance of its estates to a trustee for behoof of creditors, containing a provision that the ranking of the creditors should

be regulated according to the Bankruptcy Acts. In an action brought by the bank against the trustee, for declarator that its claim should be ranked without deduction of the value of these securities, Lord M'Laren, Ordinary, held that as the bank had acquired the bonds from third parties, on an absolute title, the subsequent transference of the reversionary right to the firm did not affect the bank's right, and that the value of the securities did not fall to be deducted from the bank's claim. The defender having reclaimed, the Court held that, in so far as the bonds belonged to the firm at the date of bankruptcy, the bank's right was a right of security over part of the bankrupt estate, and that, as a condition of ranking, the bank was bound to deduct these securities,—*Royal Bank of Scotland* v. *Millar and Co.'s Trustees*, 1882, 9 R. 679.

In the *University of Glasgow* v. *Yuill's Trustees*, 1882, 9 R. 643, it was held that where the debtor has parted with the security subjects, the bondholder is entitled to rank on the granter's bankrupt estate for the full sum in the bond without deducting the value of the security.

It will be remembered that in a voting claim the creditor is bound to deduct the value of the obligations of parties liable in relief to the bankrupt, but this rule does not hold in the case of ranking. Though such obligations, as well as securities held from *co-obligants*, require to be specified in the claim for the information of the trustee, they do not require to be deducted from the debt. The creditor is entitled to be ranked on the estates of all co-obligants for the full amount of his debt, and to draw dividends until he is paid 20s. in the pound. Under this rule a bank is entitled to rank on the estate of all the granters of a bond of credit for the sum due upon it, to the effect of getting full payment. And so in the case of a bill they are entitled to rank on the estates of the drawer, acceptor, and indorser for the full amount due on the bill at the dates of sequestration of the respective co-obligants. The statute makes an exception to this rule in the case of a claim against the partners of a company. The company being bound to relieve its partners from company

debts, the trustee is directed, in adjusting the ranking against the partners, to deduct from the claims on their estate the value of the claim against the company, or, in other words, to deduct from the claim against the partner the amount of the dividend which the company estate yields on the particular debt.

It sometimes happens that in claims by banks upon sequestrated estates which include a number of bills they draw more than 20s. in the pound on some of these, by ranking on the estates of all the obligants. In such a case the bank is not entitled to apply the surplus arising on the overpaid bills towards payment of any deficiency on other bills in their claim. Each bill stands on its own footing, and where more than 20s. is recovered on it, the surplus must be handed over to the party legally entitled to it,—*Patten* v. *The Royal Bank*, 1853, 15 D. 617.

The same debt cannot be ranked twice by separate creditors on a bankrupt estate. This would be what is called a double ranking, a ranking which is carefully excluded by the bankrupt law. One or two examples will serve to illustrate the effect of a double ranking. Suppose a bank, under a bond of credit, ranks upon the estate of the principal for the sum due under it and draws a dividend, and thereafter recovers the balance from a surety, the surety in this case is excluded from a ranking on the bankrupt estate, because a dividend has already been drawn in respect of the debt. And so in the case of a bill. If the holder once ranks it and draws a dividend from the acceptor's estate, the drawer, or any indorser who may afterwards have to pay the balance, has no right to a ranking. The rule against double ranking does not, however, apply where an insolvent debtor has compounded with his creditors without being made bankrupt or being divested of his estate,—*Mackinnon* v. *Monkhouse*, 1881, 9 R. 393.

Cross bills—that is, bills granted for mutual accommodation—are good considerations for each other, but so long as they remain undiscounted they extinguish one another. If the bills are discounted, and both parties become bankrupt, the holders

are entitled to rank on the respective estates, and though one estate should pay a larger dividend than the other, no claim can be made for the difference by the one estate against the other. If one of the parties has discounted his bill and becomes bankrupt, and the other remaining solvent has to pay both bills, he can only rank on the one accepted by the bankrupt, and cannot rank on the other accepted by himself for the bankrupt's accommodation.

No department of the bankrupt law has been less satisfactorily adjusted than that relating to the ranking of cross bills. It has been found impossible to lay down any general rules which will meet the complications arising out of bill transactions, partly onerous and partly accommodation, more particularly where four or five estates are all mixed up with the transactions; and, unfortunately, the decisions of the Court are often inconsistent with one another. Every case that occurs presents some features different from its predecessor, and it has been found a matter of so great difficulty that writers have abstained from laying down many distinct principles on the subject, save the two or three given above.

Company Estates.—Where two or more persons carry on separate businesses under different firms, the estates of both companies, in the event of sequestration, must be wound up as separate estates, and the creditors on each ranked upon them separately. The result seems to be otherwise where an individual has carried on business in his own name, and an independent business under a company firm of which he was sole partner, the distinction being that no partnership exists without at least two partners. In this case no distinction will be made between the creditors of the firm and those who claimed against the bankrupt individually,—*Reid*, 10th July 1828.

In the case of *Miller* v. *Thorburn*, 1861, 23 D. 359, it was held that the creditor in a bond for a cash-account granted to Samuel Dickson for the purposes of his trade, who afterwards assumed his son as a partner, and carried on business

under a firm, was entitled to be ranked on the company estate, though the bond had not been confirmed by the company. The Lord Justice-Clerk laid it down as a matter of general principle, "that where a new firm takes over the whole stock and business of a going concern, it is held also to take over the whole liabilities;" and Lord Wood remarked, "I can have no doubt, in point of law, that the new company are liable for the proper trade debts incurred by the old concern."

It appears, however, that when a change occurs in a firm the new firm and new partners do not become liable for debts in the old, even if the assets be taken over, unless an intention to this effect be established by agreement, express or implied. "But where a new firm, formed by the assumption of a new partner, takes over the whole stock and business as a going concern without any arrangement for winding up the old company's affairs or for accounting, it may more readily be presumed to take over its liabilities also."—(See Bell's Principles, sec. 370.)

In *Stuart* v. *Auld*, 1851, 13 D. 1337, where a company which carried on business in Glasgow and Sydney was sequestrated both in Australia and Scotland, it was held that a creditor, who had obtained a dividend of 7s. 6d. per pound in Sydney, could only claim to be ranked in Scotland for his full debt after the Scotch creditors, who had received no dividend from the bankrupt estate in Australia, had received an equalising dividend of 7s. 6d. per pound.

In addition to preferable, ordinary, and contingent creditors, as distinguished by the Act of 1856, there is a class known as postponed creditors. Of the latter class may be mentioned—(1) persons who have lent money or sold a goodwill in a business with a stipulation for a share of the profits, or a rate of interest according to the profits earned, in either case under the Partnership Act, 1890; (2) married women, under the Married Women's Property Act, 1881, who have lent or intrusted money or other estate to their husbands, or immixed them with his funds, such persons are only entitled to a ranking after the other onerous creditors have received 20s. in the pound, in

respect of their claims as lodged,—*National Bank* v. *Cowan*, 1893, 21 R. 4 (as to immixing of funds).

Before leaving the subject of ranking, it may be of use to advert to a feature of the English Bankrupt Law, of much practical importance in connection with the proof of debts. In Scotland, as we have already had occasion to observe, the accounts between a bankrupt and his creditors close as at the date of sequestration. The creditor is not bound to deduct any payments received from co-obligants subsequent to that date, and is entitled to draw dividends on the amount of his claim as it may then stand.—(Bell's Commentaries.) But it is otherwise in England. The creditor is required to deduct all payments to account, from whatever source received, up to the time of *proving his debt*. It is therefore of much practical importance in an English bankruptcy to prove the claim as early as possible, as otherwise the dividend on sums which may be paid by co-obligants would be lost. The practice is frequently resorted to in England of refraining from taking payments to account from co-obligants till the creditor's claim is put on the file, in order to prevent the loss of dividends.

Division of the Estate and Payment of Dividends.

On the bankrupt estate being converted into money, the trustee falls to divide the same among the creditors, according to their several rights and interests. When sufficient funds have been realised, the first dividend is payable on the first lawful day after the expiration of *six* months from the date of the deliverance actually awarding sequestration; and the second dividend is payable on the first lawful day after the expiration of ten months from the same date. Every subsequent dividend is payable on the first lawful day after the expiration of three months from the date of payment of the immediately preceding dividend until the whole estate is divided; but after the second dividend is made, a majority of creditors, at a general meeting called for the purpose, may resolve to accelerate the

times for payment of dividends. The commissioners may postpone the time of payment, and on special application to the Court by the trustee and commissioners the times of payment of dividends may be altered.

In order to entitle a creditor to payment of the first dividend, he must lodge with the trustee his oath and vouchers of debt at least *two* months before the time fixed for payment of it; and, to entitle him to payment of the future dividends, he must produce his oath and vouchers at least one month before the date fixed for their payment. If a creditor should be too late in proving his debt to get the benefit of the first dividend, he is entitled to an equalising dividend with the other creditors in any subsequent division of the estate, should the funds be sufficient to admit of this.

The trustee must give notice of the time and place of payment of the dividends by advertisement in the *Edinburgh Gazette* published next after the expiration of fourteen days from the statutory periods for lodging claims, and by circulars addressed to the creditors, in which he shall specify the amount of the claim and proposed dividend.

Where a creditor claims a preference which is not admitted, the trustee may still rank him as an ordinary creditor. A trustee may also admit a claim in whole or in part, or subject to a condition,—*Clydesdale Bank* v. *Anderson*, 1890, 27 S.L.R. 493. If a trustee reject any claim, he must, in his deliverance, state the grounds of the rejection, and notify the same to the creditor by letter, containing a copy of his deliverance. The creditor may appeal to the Sheriff or the Lord Ordinary if he is dissatisfied with the trustee's deliverance, but the note of appeal requires to be lodged with the Sheriff-Clerk or Bill-Chamber Clerk, as the case may be, before the expiration of fifteen days from the publication in the *Gazette* of the notice of dividend.

By section 86 of the Bankruptcy Act of 1856, the trustee shall be amenable to the Lord Ordinary or to the Sheriff, although resident beyond the territory of the Sheriff, to account for his intromissions and management, by petition served upon

him. It has been held that the main purpose of this right of appeal is to give the Lord Ordinary and the Sheriff jurisdiction to entertain complaints for malversation in office, and that a creditor is not entitled under it to obtain a review on the merits of the trustee's deliverances, on the individual claims lodged in the sequestration,—*M'Adam* v. *Martin's Trustees*, 1884, 12 R. 358.

The trustee is directed to lodge all unclaimed dividends in the bank in which the money received by him as trustee was lodged, to the credit of an account kept under the title of "Account of Unclaimed Dividends;" and the "Register of Unclaimed Dividends," kept by the Accountant in Bankruptcy, contains an alphabetical list of all creditors entitled to such unclaimed dividends. Any creditor entitled to an unclaimed dividend may apply to the Lord Ordinary for authority to receive the same, and upon presenting the warrant at the bank, is entitled to receive the same, but without any interest.

Settlement by Composition.

Where this mode of liquidation is agreed upon by the creditors, it is generally the most advantageous, since the bankrupt is likely to realise the estate more cheaply than another, and is therefore able to make the best offer for it. One obvious objection to this course is the possibility of particular creditors having come to collusive arrangements with the bankrupt, to their own advantage. An offer of composition, of so much per pound, may be made by the bankrupt, either at the first general meeting of creditors, or at the meeting after his examination, or at any subsequent meeting called for the purpose. Security must be offered for the whole composition, otherwise the offer is of no avail.

If the offer be made at the first meeting, a majority of the creditors in number, and nine-tenths in value, present, may resolve to entertain the offer for consideration; and, in such case, the trustee must forthwith insert a notice in the *Edin-*

burgh Gazette that the offer has been so made and entertained, and that it will be decided on at the meeting to be held after the examination of the bankrupt, at a specified time within a specified place. If a majority in number and nine-tenths in value of the creditors present at the said meeting accept the offer of composition, a bond of caution must forthwith be lodged in the hands of the trustee. Where the offer is made at the meeting after the examination of the bankrupt, or at any subsequent meeting, a majority in number and four-fifths in value is sufficient. The accounts of the trustee are thereupon audited, and all expenses provided for by the bankrupt; whereupon the trustee reports to the Lord Ordinary, or the Sheriff, as the case may be, the resolution of the creditors, along with the bond of caution; and if no objections are offered, the judge pronounces a deliverance approving of the composition. The deliverance, in effect, ends the sequestration, and discharges the trustee.

An offer of composition may in like manner be submitted at any future meeting of creditors called for the purpose; but once an offer has been rejected by the creditors, no other offer can be made, unless nine-tenths in number and value of all the creditors, ranked and entitled to be ranked, previously assent in writing to such offer, which must state the amount of the composition, and be subscribed by the proposed cautioner. A partner may accept a composition on behalf of his firm,—*Mains* v. *M'Glashan and Black*, 1895, 22 R. 329.

In the deliverance approving of the composition, the bankrupt is discharged of all his debts contracted before the date of sequestration, and he only remains liable for the composition. He is at the same time reinvested in his whole estates; but the rights of security and preference creditors remain unaffected. A creditor holding a security over part of the bankrupt estate must value and deduct the same before claiming under a composition-contract,—*Macbride* v. *Stevenson*, 1884, 11 R. 702.

Recovery.—The bond of caution for the composition is always

recorded in the Books of Council and Session, or of the Sheriff Court, and an extract given to the trustee. Either this or a new extract may be obtained by any creditor who has not been paid his composition; and if the creditor holds a liquid document of debt, such as a bond, bill, or decree, he may obtain letters of horning from the Bill-Chamber of the Court of Session to charge the bankrupt and his cautioner to pay the composition within six days, on pain of poinding. If the creditor does not hold a liquid document of debt, he may obtain letters of horning on production of the extract bond with a certificate by the trustee of the amount of the ranking, or of the debt having been given up in the bankrupt's state of affairs. Illiquid claims, which have not been ranked or given up in the bankrupt's state, have not the benefit of summary diligence, but must be constituted by ordinary action. In the case of *Hatley* v. *Magistrates of Burntisland*, 1861, 23 D. 881, it was held that a cautioner in a composition-contract was not entitled to suspend a charge for payment of the composition, or to object to a debt which had been admitted as due without question in the acceptance of the offer of the composition.—(See sec. 143.)

The bankrupt is not bound to grant composition bills, unless it formed part of the arrangement that he should do so.

The bankrupt is not entitled to object to any debt which he has given up in the state of his affairs as being due by him, or admitted without question, in reckoning whether the necessary amount of consents to the acceptance of the composition has been obtained.

Discharge without Composition.—The bankrupt may, immediately after his examination, petition the Court to discharge him of all his debts, provided all the creditors who have produced their oaths consent. At the end of six months he may petition for a discharge, with consent of a majority in number and four-fifths in value; at the end of twelve months, with consent of a majority in number and two-thirds in value; and

at the end of eighteen months, with the consent of a majority both in number and value. On the expiration of two years, he may petition for a discharge without any consent of creditors at all. It is, however, necessary, in the first instance, before presenting any petition for a discharge, for the trustee to report on the conduct of the bankrupt, and to state whether he has complied with the provisions of the Act; and, specially, whether he has made a full surrender of his estate, and whether his bankruptcy has arisen from innocent misfortune or reckless trading. No discharge is competent to any bankrupt who has been concerned in or cognisant of any preference, gratuity, or other means of procuring his discharge. So, in the case of *Pendreigh*, 1875, 2 R. 769, the Court held it their duty to refuse the bankrupt's application for a discharge, although no appearance was made in the application either on the part of the trustee or the creditors. In the case of *Buchanan* v. *Wallace*, 1882, 9 R. 621, failure to keep accounts, and other irregularities on the bankrupt's part, were held to warrant the Sheriff in imposing the condition that decree of discharge should not be extractable for three months.

By section 3 of the Bankruptcy Amendment Act, 1860, discharge may be refused for fraudulent concealment by the bankrupt of any part of his estate.—(See *Millar*, 1877, 5 R. 144.)

It is open to any creditor to oppose the bankrupt's discharge on reasonable grounds. Discharge, if granted without composition, does not imply reinvestiture, or put an end to sequestration, unless the dividends paid amount to twenty shillings in the pound, and the sequestration may be revived after the discharge of both trustee and bankrupt for the distribution of estate of the bankrupt which has not been expressly abandoned by the creditors,—*Northern Heritable Securities Investment Co. Ltd.* v. *Whyte*, 1888, 16 R. 100.

Further restrictions to the bankrupt's right of discharge are imposed by the Bankruptcy and Cessio Act, 1881. Thus, by section 6 of the Act, it is provided that a bankrupt shall not at any time be entitled to be discharged of his debts

unless it is proved—(*a*) That a dividend of not less than five shillings in the pound has been paid, or that security for payment thereof has been found to the satisfaction of the creditors; or (*b*) that the failure to pay such a dividend has arisen from circumstances for which the bankrupt cannot justly be held responsible. In the event of a discharge being refused, the bankrupt may, on payment of such additional sum as makes up five shillings in the pound, apply again and obtain his discharge in the same manner as if a dividend of five shillings in the pound had originally been paid out of his estate. As to the kind of circumstances for which the bankrupt will or will not be held responsible, the cases of *Clark*, 1883, 11 R. 246; *Boyle*, 1885, 12 R. 1147; and *Phillips*, 1885, 13 R. 91, may be taken as examples. See also Lord M'Laren's deliverance in *Shand* (Petitioner), 1882, 19 S.L.R. 562, since, in this case, the trustee's report was very adverse to the bankrupt; and *Brenner* (Petitioner), 1900, 2 F. 1114.

Winding-up under Deed of Arrangement.—This plan was taken from the English Bankruptcy Law, but it has not been found generally suitable in Scotland, and has frequently given rise to much dissatisfaction on the part of creditors. It leaves the estate virtually under the control of the bankrupt, the superintendence of the Court ceasing with the approval of the deed of arrangement. No special form is prescribed for the deed of arrangement; therefore its provisions may bear that the creditors shall realise and distribute the estate, or it may provide for a realisation by a trustee, or even by the debtor, where he undertakes to pay a composition. In England this mode of winding-up is frequently resorted to, especially in the case of large concerns, where it is of importance to continue the business for the interest of all parties; and as the arrangement proceeds under the superintendence of the Court of Bankruptcy, the creditors have perfect control over the actings of the bankrupt.

The 35th section of the Bankruptcy Act, 1856, provides, that at the meeting for electing a trustee, or at any subsequent

meeting called for the purpose, a majority in number and four-fifths in value of the creditors present at such meeting may resolve that the estate ought to be wound up under a deed of arrangement, and that an application should be presented to the Lord Ordinary, or the Sheriff, to sist procedure in the sequestration for a period not exceeding two months; and, on such resolution being carried, it shall not be necessary to elect a trustee. The bankrupt, or any person appointed at the meeting, may within four days report such resolution to the Court, and apply for a sist. The judge may hear any party interested; and if he find that the resolution was duly carried, and the application reasonable, he may grant the same, and may make such arrangement for the interim preservation and management of the estate as shall appear necessary. If the sequestration be sisted, the creditors may, at any time within two months, produce to the Lord Ordinary, or the Sheriff, a deed of arrangement subscribed by, or by authority of, four-fifths in number and value of the creditors of the bankrupt: and, after making such investigation as he may think proper, and hearing parties interested, and on being satisfied that the deed has been duly entered into and executed, and is reasonable, the judge shall approve thereof, and declare the sequestration at an end; and such deed shall be as binding on all the creditors as if they had acceded thereto; provided the sequestration shall have full effect in so far as may be necessary for challenging or setting aside preferences.

If the resolution is not duly reported, or if the deed is not duly executed or approved of, the sequestration shall proceed, and the judge may make all necessary orders by appointing meetings of creditors, and otherwise, for resuming the necessary procedure.

It may be mentioned here that the 90th section of the Act gives full power to the Sheriff, on application by the trustee, to order an examination of the bankrupt's wife and family clerks, servants, factors, law-agents, and others, who can give information relative to his estate. It is unnecessary for a

trustee to raise an action for production of documents; his proper course is to call for the writs he requires under sections 90, 91, and 92 of the Bankruptcy Act, 1856,—*Selkirk* v. *Service*, 1880, 8 R. 29.

Under a deed of arrangement, unlike the case of an ordinary composition, the creditors may accept the offer of composition without caution, and it is not necessary that the bankrupt should pay five shillings in the pound, or show that his failure to do so was due to circumstances for which he could not justly be held responsible. If, however, the composition be not duly paid, the original debt revives, and a creditor may sue for the whole debt, under deduction of any instalments paid,—*Alexander* v. *Yuille*, 1873, 1 R. 185.

Preferences and Collusions.—The 150th section of the Act provides that "all preferences, gratuities, securities, payments, or other consideration not sanctioned by this Act, granted, made, or promised, and all secret or collusive agreements and transactions, for concurring in, facilitating, or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void, and if, during the sequestration, any creditor shall have obtained any such preference, gratuity, security, payment, or other consideration or promise thereof, or entered into such secret or collusive consideration or agreement or transaction, the trustee shall be entitled to retain his dividend, and he or any creditor ranked on the estate may present a petition to the Lord Ordinary or to the Sheriff, praying that such creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, gratuity, security, payment, or other consideration given, made, or promised, and if no cause be shown to the contrary, decree shall be pronounced accordingly; and the sums which in such case may be recovered shall, under deduction of the expenses of recovering the same, be distributed by the trustee among the other creditors under the sequestration; and

if the sequestration shall have been closed, it shall be competent to any creditor who shall not have received full payment of his debt to raise a multiplepoinding in name of the person who has obtained such preference, gratuity, security, payment, or other consideration or promise as aforesaid, and on the value of the preference, gratuity, or security, or amount of the sum paid or consideration obtained being ascertained, double such value or amount, together with the amount of the debt of the colluding creditor, shall be ordered to be consigned by him, and shall be divided among the creditors who were ranked or were entitled to be ranked in the sequestration, and have not received full payment of their debts, and who shall lodge claims in such multiplepoinding, according to their respective rights and interests; and such multiplepoinding shall be executed in terms of law against the colluding creditor, and notice thereof at the same time be inserted in the *Gazette;* and in the event of there being any surplus after paying the full debts of the creditors, and defraying the expenses of the sequestration or other proceeding, the same shall be paid into the account of unclaimed dividends, as hereinafter provided."

Under this section, the most important case which has occurred since the passing of the Act is the case of *Carter* v. *M'Laren*, Court of Session 26th October 1869, H.L. 9th May 1871, 9 Macph. (H.L.) 49. In this case the defenders, who were creditors of a bankrupt firm, were dissatisfied with the offer of a composition made by the bankrupts, and questioned its competency on technical grounds. At the statutory meeting for entertaining the composition the defenders protested and left the meeting along with others who adhered, but the rest of the creditors present at the meeting resolved to entertain the composition, and at a subsequent meeting the offer was accepted in terms of the statute. The defenders were not present at this latter meeting, and they appealed against the resolution of the creditors. The Court held the whole proceedings as not within the terms of the Bankruptcy Act. But, intermediately between the meeting entertaining the offer and the meeting

accepting it, a payment was made to the defenders by a neutral person in the interest of certain creditors who were specially desirous to sustain the composition. This payment was accepted by the defenders on the understanding that no part of it was to be taken from the creditors. But the defenders found out that they had acted in violation of the section before us, and they at once returned the money, with five per cent. interest. On the other hand, the rest of the creditors insisted on the trustee applying to the Court for the enforcement of the statutory penalties—viz., the forfeiture of the defenders' claim on the bankrupt estate, and the payment to the trustee for the benefit of the general body of creditors of double the amount of the preference. The pursuer lost his case, both before the Lord Ordinary and the First Division, but the House of Lords reversed and remitted to the Court of Session to inflict the statutory penalties; the Lord Chancellor and Lords Chelmsford, Westbury, and Colonsay exonerating the defenders at the same time from having acted with any *malus animus*.

The 151st section provides that if a bankrupt is concerned in, or cognisant of the giving of such preferences, he shall forfeit all right to discharge and all benefits under the Act, and discharge, if granted, shall be annulled.

CHAPTER XVII.

TRUST-DEED FOR CREDITORS, COMPOSITION-CONTRACT, AND CESSIO BONORUM.

1. Trust-Deed.—Where the creditors of an insolvent party are desirous of coming to a fair distribution of the estate, the trust-deed is a safe and economical arrangement, and the division may be carried out more expeditiously than under the Bankruptcy Act. Unless, however, the creditors are quite unanimous, the arrangement is very liable to miscarry, and, indeed, where one or more creditors refuse to accede to the trust, it is needless to proceed with it, as it may at once be defeated by any creditor using diligence against the estate of the debtor. As the arrangement is extrajudicial and voluntary, diligence can alone be prevented by the consent of the creditors. If certain of the creditors have obtained voluntary or judicial preferences over the debtor's estate, and refuse to renounce them, they cannot well be reduced under a trust-deed, and in such a case sequestration ought to be resorted to.

The usual method of proceeding where a trust-deed is resolved on is by the debtor conveying his whole estates, heritable and moveable, to a trustee or trustees in succession, in trust for behoof of his creditors, according to their respective rights and interests. The deed is irrevocable during insolvency. The title of the trustee is completed as in the case of ordinary conveyances. It is desirable to enumerate the creditors and the amount of their debts, either in the deed or in a separate schedule, signed as relative to it, as this saves disputes as to the claims of creditors, and has the effect of preventing the debts from prescribing, which might otherwise occur. It is quite settled that a trust-deed which does not specify the credi-

tors and the amount of their debts has not the effect of a reconstitution of the debts, so as to prevent prescription,—*Blair* v. *Horn*, 28th November 1868.

All creditors, at the date of granting the deed, are entitled to share in the distribution, future creditors being entitled to share only in the reversionary right. For the purpose of realising and dividing the estate, the trustee is vested with full powers of sale, and empowered to judge of the claims of creditors. The deed generally contains a provision that the trust shall be administered, and the claims of creditors dealt with, according to the rules of the Bankruptcy Act, but a creditor is not bound by such conditions unless he consents to them. The deed, being voluntary, must be unconditional. Thus, where the trust-deed contained the condition that all creditors acceding or receiving a dividend should be held to have discharged their claims in full, it was held that a non-acceding creditor was entitled to his share in proportion to his debt unconditionally, and that he was entitled to recover his share by direct action against the trustee,—*Ogilvie and Son* v. *Taylor*, 1887, 14 R. 399. Lord Young remarked: "It is quite certain that no debtor is allowed to put his estate beyond the reach of his creditors, or to prescribe conditions on which alone they are to be allowed to participate." A provision for the debtor's discharge is not one of such an extraordinary character as to render the voluntary trust invalid,—*Henderson* v. *Henderson's Trs.*, 1882, 10 R. 185.

The deed also contains a conditional discharge to the debtor, by declaring that the creditors' acceptance of the dividend shall be in full satisfaction of their debts. It is a condition of a trust-deed that the trustee shall account to the granter for any balance after the creditors have been paid.

The accession of the creditors to the trust may either be express or implied. Express accession is proved by the signature of the creditor or his mandatory to the deed of agreement, or by signing minutes of meeting of creditors. Accession may also be inferred from the actings of the creditor, such as his attendance at a meeting at which common measures are resolved

upon without his dissenting from them. In one case it was held that a creditor had acceded by attending a meeting at which a resolution was passed without objection authorising an agent to see that no preference was obtained by any of the creditors. Acting as a commissioner on the estate, or lodging a claim in the trust, with a view to drawing a dividend, will also infer accession. In short, any actings on the part of a creditor calculated to deceive others into a line of conduct which they would not have pursued had they been aware of his opposition, will debar such creditor from proceeding with separate measures.

The assent given by each creditor is understood to be given on the express understanding that all the other creditors will accede, and that no creditor has received any undue advantage. If, therefore, any non-acceding creditor proceeds with diligence against the person or estate of the debtor, any acceding creditor is, in such case, also entitled to adopt whatever legal measure he may think proper.

The effect of accession, where all the creditors have agreed to the trust, is to bind each creditor to co-operate with the general body, and to debar him from using separate diligence against the person or estate of the debtor. It is important for creditors who have other obligants bound with the debtor, and to whom he is liable in relief, to keep in view that, by acceding to the trust without first obtaining the consent of such obligant, the latter may thereby be released from his obligation. It is a fixed rule of law, that in the division of an insolvent estate among creditors a secured creditor is at common law entitled to rank for the full amount of his original debt, without deduction of the value of his security or any sums which he may have realised from it, even although the process is one of judicial factory under the 164th section of the Bankruptcy (Scotland) Act, 1856,—see *Wight's Trustees* v. *Jamieson*, 1863, 1 Macph. 815.

The general duties of a trustee are, to administer the estate for behoof of the creditors, and to rank them and pay them a dividend in accordance with their legal rights. He may use all diligence open to him to prevent parties acquiring preferable

rights. He cannot, however, challenge preferences, unless he has (1) power under the trust-deed to do so, and (2) the consent of creditors having a right to challenge,—*Fleming's Trustees* v. *M'Hardy*, 1892, 19 R. 542; *M'Laren's Trustees* v. *National Bank*, 1897, 24 R. 920.

The trustee is not directly subject to the control of the Courts of law; and where he does not accomplish with due diligence the purposes of the trust, or delays to account for his intromissions, it is rather difficult for the creditors to obtain redress. The trustee is liable to action at the instance of the debtor and also of the creditors to denude and account for his intromissions,—*Lucas' Trustees* v. *Beresford's Trustees*, 1892, 19 R. 943. The trustee, if he get notice of a creditor's claim, is not entitled to pay over the balance in his hands to the truster, and if he do so he is personally liable to the creditor,—*Cruickshank* v. *Thomas*, 1893, 21 R. 257.

A trust-deed will not be open to reduction by non-acceding creditors, and will be effectual against the diligence of any individual creditor only if it deals fairly with all the creditors; if the trustee has taken possession of the estate; and provided the granter is not made notour bankrupt within sixty days thereafter. A sequestration, however, no matter when awarded, supersedes a trust-deed, and the trustee under the trust-deed is bound to account and pay over to the trustee in the sequestration.

2. Composition-Contract.—A composition-contract is an arrangement between a debtor and his creditors, whereby the debtor agrees to pay either his debts in full, or a portion of them in place of the whole, by instalments of so much per pound at fixed periods. The arrangement is generally carried out in practice by a minute of agreement, signed by the debtor and his creditors, whereby the former binds himself to pay, and the latter agree to accept of the composition offered in full of all claims. Less formal evidence may, however, bind the parties, such as assenting to a minute of the creditors, em-

bodying the arrangement. A third party may make the offer of composition on behalf of the debtor, and a person duly authorised by the creditors may accept. A partner is within his authority in accepting for his firm an offer of composition,—*Mains and Another* v. *Black*, 1895, 32 S.L.R. 273.

A composition-contract implies that all the creditors concur in it, and that they shall all be dealt with equally. If one or more of the creditors do not agree to the arrangement, or if any of them receive a higher composition than the others, any creditor may take exception to the contract, and may refuse to implement it, or reduce it if it has already taken effect. The arrangement presupposes that every creditor has agreed to it only on condition of there being a fair and equal distribution of the estate among all the creditors. A creditor holding security over any part of the bankrupt's estate must value the security and deduct before claiming,—*Macbride* v. *Stevenson*, 1884, 11 R. 702; but where the burdened subjects have been sold and thus cease to be part of the estate of the bankrupt, the bondholder may rank for the full sum in the bond, without deducting the value of the security,—*University of Glasgow* v. *Yuill's Trustees*, 1882, 9 R. 643.

The practice of carrying out the arrangement is not by any means uniform. The most correct method is by the debtor issuing composition bills to the creditors, and receiving up the original grounds of debt discharged. In this way the arrangement is placed on the most distinct footing, and is freed from many complications and risks which might otherwise arise. If, after composition bills are issued and the original grounds of debt given up discharged, the debtor fails to implement the contract, and is sequestrated, the creditors will rank for the amount of the composition only, under deduction of any instalments they may have received. And in this there is no hardship to any particular creditor, as all the others are on precisely the same footing.

Where the arrangement is allowed to stand simply on the written contract, without the issue of composition bills, and

afterwards breaks down, the rights of creditors will fall to be determined in any subsequent sequestration according to the terms of the contract. If it contains an *absolute* discharge, without any proviso that the original debt shall revive if the composition is not paid, it would probably be held in Scotland, as in England, that the creditor is entitled, in a subsequent sequestration, to rank only for the unpaid portion of the composition. If, on the other hand, the contract contains a conditional discharge only, the original debts of the creditors revive, and they are entitled to prove for the full amount thereof, under deduction of any sums they may have received from the debtor.

It is also a settled point that, if the debtor does not pay the composition at the time it falls due, when no discharge has been given, the original debt will revive; and it will not avail him, as a defence to a process brought against him for the original debt, to offer payment of the composition. This was decided in the case of *Woods, Parker, and Co.* v. *Ainslie*, 1860, 22 D. 723. In this case the Union Bank, Sunderland, agreed to accept of a composition of 4s. in the pound on certain bills. The debtor paid one-half of the composition, but failed to pay the other. A suit having been brought against him for payment of the original debt, less the sum received, he pleaded in defence, that before the action was raised he frequently offered to pay the balance of the composition, and now offered to do so. The Court held the defence irrelevant, and pronounced decree for the pursuer; the Lord Justice-Clerk remarking that "it is part of the law of mutual contract, by which, if the condition of paying the composition be violated, the original debt will revive."

The composition-contract being a voluntary arrangement, creditors agreeing to it require, in the first instance, to obtain the consent of any obligants bound for the debt, to whom the debtor is liable in relief, otherwise such obligants will be discharged.

A cautioner will be freed if the creditors, by their actings,

vary the terms of his obligation without his consent. Thus a cautioner for a last instalment in a composition was held to be freed where the creditors took a general conveyance from the bankrupt over his whole estate, without having received the consent of the cautioner,—*Allan* v. *Pattison*, 1893, 21 R. 195.

3. Cessio Bonorum.—*Cessio bonorum* was, under the old law, a process whereby an insolvent debtor incarcerated for *civil* debt, or against whom a warrant of imprisonment had been issued, might secure his personal freedom on proving that his bankruptcy had arisen through innocent misfortune, and offering to grant a disposition *omnium bonorum* for behoof of his creditors. By the abolition of imprisonment for debt (43 and 44 Vict. c. 34, and 45 and 46 Vict. c. 42) cessio in this sense became unnecessary and practically obsolete. Subsequent legislation has remodelled the process in a form which is simply a cheap and summary sequestration, proceeding on a petition either by the debtor himself or by a creditor. The Acts now regulating cessio are 6 and 7 Will. IV. c. 56, 39 and 40 Vict. c. 76, and, under its altered character, the Debtors (Scotland) Act, 1880, 43 and 44 Vict. c. 34, and the Bankruptcy and Cessio (Scotland) Act, 1881, 44 and 45 Vict. c. 22. By section 7 of the Debtors Act, 1880, any debtor who is notour bankrupt may present a petition for decree of *cessio bonorum*. This petition must be in the form provided by 6 and 7 Will. IV. c. 56, section 3, setting forth the notour bankruptcy of the debtor, and his willingness to surrender his estate, and containing a list of all the creditors, specifying their names, designations, and places of residence so far as known. By section 8 of the Debtors Act, any creditor of a debtor who is notour bankrupt may present a petition to the Sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed to take the management and disposal of the estate for such behoof, and

such process shall be taken and deemed to be a process of cessio. In the petition there must be inserted a list of all the creditors of the debtor, specifying their names, designations, and places of residence, so far as known to the petitioner; and with the petition must be produced evidence that the debtor is notour bankrupt. Where the debtor has only moveable estate, the disposition is generally dispensed with, but it is necessary to the trustee as a title to heritable estate. By section 9 of the Debtors Act, on a petition for cessio being presented either by the debtor or by a creditor, the Sheriff, if satisfied that there is *prima facie* evidence of notour bankruptcy, shall issue a warrant appointing the petitioner to publish a notice in the *Edinburgh Gazette* intimating that such petition has been presented, and requiring all the creditors to appear in Court on a certain day, not less than thirty (altered by the Bankruptcy and Cessio Act, 1881, section 12, to eight) days from the date of the *Gazette* notice, the petitioner being bound, within five days from the date of the notice, to send a copy to all the creditors. Thereafter the debtor is ordained to appear before the Sheriff for public examination, and to lodge a state of affairs. The section also deals with the procedure to be observed at the public examination, with the penalties for refusal to answer questions, or produce books, &c., and with the Sheriff's discretion to grant or refuse the petition. The Court will not readily interfere with the Sheriff's decision. The decree, if granted on the petition of the debtor, may be conditional. Thus the debtor may be required to assign a portion of his income to his creditors,—*Calderhead* v. *Freer and Dobie*, 1890, 17 R. 1098. Until the debtor executes a disposition *omnium bonorum*, any decree decerning him to do so operates as an assignation of his moveables in favour of the trustee.—(See *Gray* v. *Gray's Trustees*, 1895, 22 R. 326.) The expenses are payable out of the readiest of the funds conveyed by the disposition.

By the Bankruptcy and Cessio Act, 1881, section 9, if the debtor fails to appear, in obedience to the citation in a process of *cessio bonorum*, at any meeting to which he has been cited,

and if the Sheriff is satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of cessio.—(See *Mackenzie* v. *Ewart*, 1891, 18 R. 925.) By section 10, the Sheriff may, in order to secure the attendance of the debtor, or any one who can give information as to his estate, grant the warrants and commissions which he is empowered to exercise in processes of sequestration under the Bankruptcy Act, 1856, sections 88, 90, and 91. By section 11, where the liabilities of the debtor exceed £200, the Sheriff may, if he think it expedient that the distribution should take place under the Bankruptcy Acts, award sequestration, and thereupon the provisions of these Acts shall apply, as if sequestration had been awarded on a petition under section 29 of the Act of 1856. The discretion of the Sheriff as to the form of distribution in such a case will not be interfered with,—*Jaffray* v. *Fleming*, 1883, 10 R. 719.

Trustee in Cessio.—By section 9 of the Debtors Act, subsection 3, the trustee is nominated by the Sheriff on the suggestion of the creditors; and if they do not agree, the Sheriff makes his own selection. Trustees are subject to the control of the Accountant of Court; their powers and functions are very fully dealt with in the Act of Sederunt 22nd December 1882, which may be referred to. On a final division of the funds, the trustee may obtain his discharge from the Accountant of Court (Bankruptcy and Cessio Act, sec. 8).

Discharge of Debtor.—Sections 5 and 7 of the Bankruptcy and Cessio Act, 1881, provide for the discharge of debtors in cessio. The debtor may apply for discharge on the expiration of six months from the date of decree, but he is not entitled to discharge unless (*a*) a dividend of five shillings in the pound has been paid, or security therefor has been found to the satisfaction of the creditors; or (*b*) the failure to pay five shillings in the pound has, in the opinion of the Sheriff, arisen from circumstances for which the debtor cannot justly be held responsible. In the event of discharge being refused, the debtor

may apply again, on paying such additional sum as makes up a dividend of five shillings in the pound.

Apart from these statutory provisions, decree of cessio does not discharge the debtor of his debts; and should he subsequently succeed to funds, or accumulate them through industry, the decree will not preclude the creditors from making such funds available for payment of their debts,—*Reid* v. *Graham*, 1894, 21 R. 935. The debtor must surrender everything except his working tools, and so much of his salary or wages as is necessary for his aliment,—*Simpson* v. *Jack*, 1888, 16 R. 131.

Petitions for cessio are now competent only before the Sheriff Court.

CHAPTER XVIII.

TRANSFER OF GOVERNMENT AND BANK STOCKS.

The principal part of the Funded Debt of the United Kingdom consists of the Consolidated Stock, which bears interest, payable quarterly, at the rate of $2\frac{3}{4}$ per cent. until 5th April 1903, and thereafter $2\frac{1}{2}$ per cent. The Unfunded Debt consists chiefly of Exchequer bills, which are issued under the authority of Parliament, for sums ranging from £100 to £1000. These bills are issued in anticipation of the revenue, and bear interest at rates which fluctuate. Exchequer bills may be transferred from hand to hand, and the holders are entitled to receive their amount from Government periodically, at par, with interest; or they may be exchanged for new bills. Full particulars of rates and times of payment of interest, &c. on all Government borrowings, will be found in monthly investment lists, readily obtainable from any stockbroker.

The Public Stocks, as well as the Indian Stocks, are managed for the Government by the Bank of England. All transfers of these and of Bank of England Stock are made in the books of the bank; and, if the holder cannot attend personally, the transfer can only be made under a power of attorney in favour of some one who can attend. The bank's books are the sole evidence of how the stock stands, and of its amount, the stock receipts being of no value in themselves against the bank. The Bank of England does not recognise trusts; and with the exception of corporations, will not open accounts for stock in name of firms, or of persons otherwise than as individuals. It is, however, common to invest trust funds in the Government stocks in name of trustees as individuals, but the bank will not accept of more than four names in one account. When the

stock stands in more than one name, the account is termed a "Joint Account." On the decease of any of the holders, the stock is at the disposal of the survivors; but before any transfer can be made or before a power of attorney can be procured by the survivors, the death of the deceased must be proved by burial certificate and declaration of identity. On the death of an individual holder, probate or confirmation of the will must be exhibited at the bank, to enable the executor to dispose of the stock or draw the dividends. The dividends are payable at the Bank of England; and if the holder cannot attend to receive and discharge them, he must authorise some one to do so for him, by a regular power of attorney. On the purchase of stock by a party resident at a distance from London, the practice is to grant a power of attorney to a London banker to accept the transfer and draw the dividends. A general power may, however, be obtained for acceptance, drawing dividends, and sale. Separate powers of attorney are required for the different kinds of stock, and, in the case of a power to sell, it must accurately describe the particular stock and its amount. In a power to draw dividends the amount need not be mentioned, as it will include all subsequent purchases.

When a power is applied for it is necessary to give the names and addresses of the parties as they stand in the books of the bank, or to send the stock receipt for the guidance and satisfaction of the bank, in issuing the power.

A power to draw dividends is *cancelled* by the granting of a new power to some other person, or by the holder drawing his dividend in person. A power by the holders of a joint account does not fall by the death of one of them, but, in this event, it is necessary to prove the decease by production of the burial certificate and declaration of identity. The bankers throughout the country are in use to take charge of buying, selling, and drawing dividends on Government Stock for their customers.

As regards the stocks of the Scotch banks, the deeds of transfer are usually prepared at the head offices of the respective

banks. In other respects the transfer of these stocks is now governed by the rules applicable to dealings in the shares of limited liability companies in general. Under Leeman's Act (30 and 31 Vict. c. 29) contracts for the sale of bank stock must accurately describe the stock to be transferred, and set forth in writing the numbers relative thereto, as these appear in the books of the company. Acceptances of transfers of bank stock by purchasers may be made by a mandatory, who may be authorised to accept by simple letter, but the letter must now bear a 10s. stamp. The Scottish banks do not object to receive trustees as shareholders, and, to suit the wants of the public, the stocks are permitted to be sold and transferred in any quantities. Trustees are personally liable for calls,—*Muir* v. *City of Glasgow Bank*, in the Court of Session, 1878, 6 R. 392; in the House of Lords, 7th April 1879, 6 R. (H.L.) 21.

The dividends may be drawn by a mandatory, and his authority, if in the shape of a letter addressed to the bank requesting the bank to pay him, requires no stamp. But, on the other hand, if the document assumes the form of a delegation of authority to a mandatory to uplift, a 10s. stamp is exigible. It has been decided that, where dividends on bank stocks are allowed to lie over without being drawn by the proprietor, the bank is not liable to pay interest for the period which may have elapsed from the time they became due.—See *Fraser* v. *Aberdeen Banking Company*, 28th June 1826.

Bank stocks may frequently be obtained at the offices of the respective banks, without incurring the expense of brokerage. The charge of brokerage in Edinburgh and in Glasgow is 10s. per cent. The rule on the exchange is that the buyer pays the expense of transfer, which, including brokerage on the Edinburgh and on the Glasgow scale, is one per cent. on the purchase-money, besides a trifling fee charged at the bank for the transfer.

APPENDIX.

APPENDIX.

FOREIGN BILL.

PARIS, 1*st January* 1901.

At sight (*or* on demand ; *or* on 27th January ; *or* days after sight, days after date) pay this, our first of exchange, second and third of the same tenor and date unpaid, to the order of Messrs. Coutts & Co., the sum of One thousand pounds, value received, and charge the same to account of

MONCREIFF & Co.

Messrs. Thomson & Sons,
Merchants, Glasgow.

(*Indorsed on the back*) Pay to A. B.
(*Signed*) COUTTS & Co.

(*Or the payee's signature may alone be indorsed.*)

INLAND BILL.

£100 sterling.

EDINBURGH, 1*st January* 1901.

Three months after date (*or* days *or* months after sight ; *or* at sight ; *or* on demand ; *or* on specified date) pay to me or order (*or* to bearer ; *or* to A. W.), at the Bank of Scotland in Glasgow, the sum of One hundred pounds, value received.

(*Signed*) J. M'LAREN.

To Messrs. Anderson & Co.,
Merchants, Glasgow.

(*Indorsement same as above.*)

BILL PAYABLE BY INSTALMENTS.

£500 sterling.

EDINBURGH, 1*st May* 1901.

At three, six, and nine months after date, by equal instalments, pay to me or my order, at your warehouse in Princes Street here, the sum of Five hundred pounds, value received.

(*Signed*) JAMES FORSYTH.

To Andrew Ferguson, Esq.,
Merchant, Edinburgh.

PROMISSORY NOTE.

£1000 sterling.

EDINBURGH, 1*st April* 1901.

One day after date (*or* on demand ; *or* at months after date ; *or* on 1st May next) I promise to pay to James Henderson or order, within the National Bank of Scotland, Limited, the sum of One thousand pounds, value received.

(*Signed*) JOHN BARCLAY.

(*Indorsement as in Bills.*)

BANKER'S CHEQUE.

EDINBURGH, 1*st May* 1901.

To the Manager of the
Bank of Scotland.

On demand pay to or bearer (*or*, or order), One hundred pounds sterling.

(*Signed*) JAMES FAIRBAIRN.

£100 sterling.

I. O. U.

ABERDEEN, 1*st May* 1901.

To Mr. A. B. (*address*).

I. O. U. One hundred pounds. C. D.

NOTICE OF DISHONOUR.

To James Wilson.

(*Place and date.*)

Take notice that a bill drawn by you (*or* on A. F., and which bears your indorsement), dated 19 , at 3 m/d., p. £100, has been dishonoured by non-payment, and that you are held responsible therefor. (*Signed*) J. L.

PROTEST OF A BILL AT THE INSTANCE OF AN INDORSEE.

(*Prefix copy of the Bill and Indorsation.*)

At Edinburgh, the Fourth day of May
Nineteen hundred and one years.

The principal bill above copied was, where payable, presented to the above-named B. and payment demanded, to which demand he made answer (*here state the answer, if any*), and said bill was thereupon duly protested by me, Notary Public subscribing, at the request of the above-named A., merchant in Edinburgh, the last indorsee thereto (*if there is no special indorsation, say*, the holder thereof), not only against the above-designed B., acceptor, for not payment of the contents, but also against the drawer and other indorsers, jointly and severally, for recourse, and against all concerned for interest, damages, and expenses (*or, if it be a foreign bill*, exchange, re-exchange, interest, damages, and expenses), as accords ; in presence of T. A. and J. F. (*design them*), witnesses specially called to the premises.

PROTEST AT THE INSTANCE OF THE DRAWER.

(*Prefix Bill as before.*)

At Edinburgh, the Fourth day of April
Nineteen hundred and one years.

The principal bill above copied was, where payable, presented to the said B. and payment demanded, to which demand he made answer (*state answer, if any*), and said bill was thereupon duly protested by me, Notary Public subscribing, at the instance of the above-named A., the drawer thereof, against the also above-named

B., the acceptor, for non-payment of the contents, and for interest, damages, and expenses, as accords ; in presence of, &c.

PROTEST OF A PROMISSORY NOTE AT THE INSTANCE OF THE HOLDER.

(*Prefix Copy and Indorsation.*)

At Edinburgh, the Fourth day of March
Nineteen hundred and one years.

The principal promissory note above copied was, where payable, presented to the said A. and payment demanded, to which demand he made answer (*here state answer, if any*), and said promissory note was thereupon duly protested by me, Notary Public subscribing, at the instance of C., the holder thereof, not only against the above-named A., the granter, for non-payment of the contents, but also against the above-named B., to whom the same is payable, and indorser thereof, for recourse, and against all concerned, for interest, damages, and expenses, as accords ; in presence of, &c.

PROTEST OF A BILL FOR NON-ACCEPTANCE.

At Edinburgh, the Twentieth day of May
Nineteen hundred and one years.

The principal bill above copied was, in the personal presence of the above-named C., presented for acceptance to said C., to which demand he made answer (*here state answer, if any*), and said bill was thereupon duly protested by me, Notary Public subscribing, at the instance of D., merchant in Edinburgh, the last indorsee (*or* holder), not only against the said C., on whom the same is drawn, for non-acceptance, but also against the drawers and indorsers, jointly and severally, for recourse, and against all concerned, for interest, damages, and expenses, as accords ; in presence of, &c.

PROTEST OF THE SAME BILL FOR NON-PAYMENT.

At Edinburgh, the Twenty-third day of August
Nineteen hundred and one years.

Which day I, Notary Public subscribing, at the request of the

above-named D., the last indorsee of the bill above copied, passed to the bank of (*or other place of payment*), where the said bill is payable ; and thereafter exhibiting and reading over the same, I represented that it had become due since the date of the protest taken thereupon for non-acceptance on the day of last, and demanded payment of the contents thereof ; which demand not being complied with, I duly protested the said bill, at the instance of the said indorsee, not only against the said C., on whom it is drawn, for non-payment of the contents thereof, but also against the drawers and indorsers, jointly and severally, for recourse, and against all concerned for interest, &c.

WHERE THE BILL IS PROTESTED FOR NON-ACCEPTANCE AND NON-PAYMENT AT THE SAME TIME, THE INSTRUMENT WILL RUN THUS :—

The principal bill, above copied, was by me, Notary Public subscribing, presented to the above-named C., on whom it is drawn, and acceptance and payment having been refused, it was duly protested at the instance of B., the last indorsee, against the said C., for non-acceptance and non-payment of the contents, and against the drawers and indorsers, &c.

PROTEST WHEN SERVICES OF A NOTARY CANNOT BE OBTAINED.

At Edinburgh, the Third day of May
Nineteen hundred and one years.

Know all men that I, A. B. [householder], of in the county of , in the United Kingdom, at the request of C. D., there being no notary public available, did on the day of 19 at demand payment [*or* acceptance] of the bill of exchange hereunder written, from E. F., to which demand he made answer [state answer, if any], wherefore I now, in the presence of G. H. and J. K., do protest the said bill of exchange.

G. H., *witness.* (*Signed*) A. B.
J. K., *witness.*

N.B.—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

RECEIPT ON A PROTEST BY A BANK AGENT TO THE DRAWER OF A BILL, WHO HAS PAID IT AFTER THE DATE OF THE INSTRUMENT.

BANK OF SCOTLAND,
GLASGOW, 1*st May* 1901.

Received from A. B., the drawer of the above-mentioned bill, the contents thereof, and charges. No diligence to go out in name of the Bank of Scotland.

(*Signed*) ANDREW NEILSON,
Manager of the Bank of Scotland, Glasgow.

DOCUMENT BILLS AND FOREIGN CREDITS.

Form of a "Clean" Credit, i.e., *a Credit without any Condition attached to it, as to delivering Shipping Documents to the Granters, or otherwise.*

To A. B. & Co.,
Merchants in Calcutta. LONDON, 21*st March* 1901.

GENTLEMEN—We hereby authorise you to draw upon us to the extent of £ (*say*) thousand pounds ; and your drafts to this extent, at months' sight, payable here, will meet with due honour on presentation, on our receiving advice from you of the same.—We remain, &c.

Form of Marginal Credit.

No. £

LONDON, 2*nd May* 1901.

Messrs. A. B. & Co. are authorised to value on us, at months' sight, for the sum of £ sterling, and we hereby agree with the drawers, indorsers, and *bona fide* holders of the bill to be drawn in virtue of this letter of credit, granted in triplicate, and numbered , that one copy of the same (the others not being accepted or paid) shall be duly honoured, provided this engagement be attached thereto, and the bill be presented to us for acceptance within from this date.

Letter taken by a Scotch Bank from a Merchant opening a Credit with a Bank abroad.

I request that you will open a credit with the Bank of , Calcutta, in favour of Messrs. A. B. & Co., to the extent of £ , to be availed of by their drafts upon the Bank of Scotland at months after sight, and payable in London, such drafts being accompanied by bills of lading indorsed to the Bank of Scotland, for merchandise invoiced to an amount not less than the sum drawn for. And I engage to pay to the Bank of Scotland the amount of all drafts drawn against said credit, at their maturity, together with the charges and commission.

As collateral security for this obligation, I assign my interest in the bills of lading of said shipments, and I hand you herewith a policy of insurance upon the merchandise for £ . In the event of my failing to pay the drafts at maturity, I hereby authorise you to warehouse the merchandise at my expense, and to sell the same as you may deem most advisable, binding myself to make good any deficiency that may arise between the proceeds of the shipments and the amount of the drafts drawn in connection with the credit, with all charges thereon. The credit to remain in force until the day of .—I am, &c.

(*Signed*) A. B.

Letter of Indemnity to a Bank in respect of Bills or other Documents sent abroad for Collection.

With reference to any bills, promissory notes, or other documents payable out of the United Kingdom, which from time to time may be discounted by you for me, or which I may lodge with you for collection, I hereby undertake and agree that my liability to you in respect of such bills or other documents shall continue, not alone during the currency of any bills or letters of credit which you may receive from your agents or correspondence in remittance of the proceeds thereof.

I guarantee to you due payment of such remittance bills, or letters of credit which you may discount to me or on which you may make me advances.

Further, I agree and undertake to free and relieve you from liability for the intromissions of the agents or correspondents to

whom you may send such bills or other documents for negotiation ; and it is understood that you are not responsible for any documents lost in transmission.

[*Signature across Sixpenny Stamp*].

RECEIPT FOR A JUDICIAL CONSIGNMENT.

BANK OF SCOTLAND,
EDINBURGH, 1*st January* 1901.

Received, for the Governor and Company of the Bank of Scotland, from James Webster, writer in Glasgow, the sum of One hundred pounds sterling, said to be the fund *in medio* in the process of multiplepoinding depending before the Court of Session (*or* Sheriff Court of), at the instance of Andrew Fergus' Executors against William Anderson and others ; and which fund was, by interlocutor of the Lord Ordinary (*or* of the Sheriff of the county), dated 26th December last, ordered to be consigned in bank, to abide the orders of the Court ; and which sum and interest thereon shall be made furthcoming to the party or parties who may be preferred by the Court thereto.

RECEIPT FOR THE SURPLUS OF THE PRICE OF HERITAGES SOLD UNDER A BOND AND DISPOSITION IN SECURITY.

NATIONAL BANK OF SCOTLAND, LIMITED,
EDINBURGH, 1*st March* 1901.

Received, for the National Bank of Scotland, Limited, from Thomas Craig, grocer, George Street, Edinburgh, and William Morrison, residing in Leith, the sum of One hundred and twenty-six pounds ten shillings, being the surplus of the price of certain heritages described in and sold under a bond and disposition in security, granted by A. B. to C. D., for Five hundred pounds, dated ; and which sum is, in terms of the Act 31 and 32 Vict. c. 101, consigned, in the names of the said Thomas Craig and William Morrison, as the seller and purchaser of said heritages, for behoof of the party or parties having best right thereto, it being understood that the bank is not cognisant of the facts above set forth.

RECEIPT FOR UNCLAIMED DIVIDENDS IN A SEQUESTRATION.

UNION BANK OF SCOTLAND, LIMITED,
EDINBURGH, 1*st May* 1901.

Received from A. B., trustee on the estate of C. D., the sum of £ , being the amount of dividends unclaimed in said sequestration, conform to list annexed, which is carried to the "Account of Unclaimed Dividends" in the books of the Bank, in terms of "The Bankruptcy (Scotland) Act, 1856," section 153.

(*Annex List of Unclaimed Dividends.*)

MANDATE TO OPERATE UPON A CURRENT ACCOUNT (NOT OVERDRAWN) AND INDORSE CHEQUES.

To the Manager of the Bank
of (*Place and Date.*)

SIR—I hereby request that you will honour all drafts or cheques signed by C. D. for me on my current (or cash) account, or cheques signed or indorsed for me by him. This mandate to subsist till recalled in writing.—I am, &c.

A. B.

MANDATE TO INDORSE A DEPOSIT-RECEIPT.

To the Manager of, &c. (*Place and Date.*)

I authorise A. B. to uplift, indorse, and discharge a deposit-receipt in my favour, granted by the Bank of Scotland, for the sum of One hundred pounds, dated .—I am, &c.

(*A* 10*s. stamp required.*)

MANDATE TO ACCEPT TRANSFER OF BANK STOCK.

To the Manager of the Bank
of (*Place and Date.*)

SIR—I hereby authorise A. B. to accept for me a transfer, in my favour, of £ Bank Stock, in the books of the Bank; and the acceptance of the said A. B. shall be as binding on me as if made by myself.—I am, &c.

(*A* 10*s. stamp required.*)

MANDATE TO DRAW DIVIDENDS.

To the Manager, &c. (*Place and Date.*)

Please pay to A. B. all dividends due and to become due on the stock of the Bank of Scotland standing in my name and his receipt shall be as effectual as if granted by myself.—I am, &c.

(*No stamp requisite.*)

PROCURATION FOR SIGNING BILLS.

We, A. B. and C. D., merchants in Glasgow, carrying on business under the firm of A. B. & Co., do hereby NOMINATE, CONSTITUTE, and APPOINT E., our principal clerk, to be our procurator, for the purpose and to the effect after mentioned; GIVING, GRANTING, and COMMITTING unto him full power, warrant, and authority for us and in our name, as our procurator, to grant and subscribe all bills, promissory notes, or other obligations necessary to the carrying on of our business; as also to draw, accept, indorse, and discharge all bills, promissory notes, accounts, and vouchers of debt of every kind due to or by us, and to subscribe by procuration all writings which may be necessary for that purpose, declaring that all such writings so subscribed by the said E. shall be equally valid and binding on us as if the same were subscribed by ourselves or by our firm: IN WITNESS WHEREOF, these presents, &c.

(*Signed*) A. B.
C. D.
A. B. & Co.

Henry Ramsay, *witness.*
Alex. Mackie, *witness.*

(*A* 10*s. stamp required.*)

GUARANTEE FOR PAYMENT OF BILLS.

To the Treasurer of the Bank
of Scotland. (*Place and Date.*)

SIR—We, A. B. and C. D., merchants in Glasgow, conjunctly and severally guarantee you full and final payment of all bills discounted, or which may hereafter be discounted by you, to or binding upon Messrs. John Anderson & Sons, merchants, Glasgow; but providing that our conjunct and several liability under this guarantee shall not exceed the sum of One thousand pounds, and interest thereon, at five per cent., from the date of demand; and providing

further, that this guarantee shall continue in full force and effect, notwithstanding any change or addition of partners in said firm, or dissolution thereof.—We are, Sir, your obed. servts.

(*A 6d. stamp sufficient.*)

GUARANTEE FOR PAYMENT OF OVERDRAFTS UPON A CURRENT ACCOUNT.

To the Manager of, &c.

Sir—I, George Wilson, manufacturer, Kilmarnock, hereby guarantee you full and final payment of all sums advanced, or which may hereafter be advanced by you to Andrew Ferguson, grocer in Edinburgh, on current account in his name; but providing that my liability under this guarantee shall not exceed Two hundred pounds sterling, and interest thereon from the date of demand: In witness whereof, these presents, &c.

(*Signed*) Geo. Wilson.

John Thomson, *witness.*
And. Haig, *witness.*

(*A 6d. stamp only.*)

GUARANTEE FOR OVERDRAFTS ON A CASH-ACCOUNT.

To the Bank of

We, John Smith, manufacturer, Glasgow, and John Henderson, merchant there, conjunctly and severally, guarantee you full and final payment of all sums overdrawn, or which may hereafter be overdrawn by Alexander Simpson & Co., commission agents in Edinburgh, on cash-account kept in their name at your office in Edinburgh; Declaring that our conjunct and several liability under this guarantee shall not exceed the sum of Three hundred pounds, and interest thereof at five per cent. per annum from the date of demand; and that this guarantee shall continue in full force and effect, notwithstanding any changes in said firm, or dissolution thereof: In witness whereof, &c.

(*Signed*) John Smith.

Alex. MacLean, *witness.*
Jas. Henderson, *witness.*

John Henderson.

John Barclay, *witness.*
David Haig, *witness.*

(*A 6d. stamp only.*)

DELIVERY ORDER FROM THE OWNERS OF COTTON.

Messrs. A. B. & Co.,
Cotton Brokers, Glasgow.

GLASGOW, 1*st May* 1901.

GENTLEMEN—Please deliver to the Bank, or their order, one hundred bales of cotton, *ex* "Amelia," marked as under.—Your obed. servt.

(*Signed*) JAS. JOHNSTONE.

H, 17
H, 33
H, 25
H, 25

100

(*To be stamped with One Penny stamp duty.*)

Brokers to Bank.

GLASGOW, 2*nd May* 1901.

Referring to the delivery order, of which the prefixed is a copy, we have now to state that we hold the one hundred bales cotton therein referred to on your account, free from all right of lien, excepting to the extent of what may be due to us for advances, for freight, and for warehouse rent.—We are, &c.

To the Manager of the

(*To be stamped with 3d. adhesive stamp.*)

CLAIM FOR VOTING AND RANKING ON THE SEQUESTRATED ESTATE OF A COMPANY.

STATE OF DEBT due to the Bank of Scotland by Cumming and Fairley, Clothiers in Edinburgh, as a Company, and John Cumming and Alexander Fairley, the individual partners of that Firm, as at the date of their Sequestration on 28th February 1900.

I. On cash-account kept at the office of the said Bank in Edinburgh, in name of the said Cumming and Fairley, under Bond of Credit granted by them as a Company, and by the said John Cumming and Alexander Fairley as partners thereof and as in-

dividuals, and by William Simpson, draper in Leith, and George Thomson, brewer in Edinburgh, p. £600, dated 3rd January 1898, ...	£595	0 0
Add interest to 28th February 1900, . . .	7	10 0
	£602	10 0
II. Principal sum overdrawn on said cash-account per separate copy thereof annexed hereto, and relative cheques, ... £160 0 0		
Interest to 28th February 1900, . . 4 10 0		
	164	10 0
[NOTE.—*The copy should start from the time the overdraft commenced, or with a docqueted balance.*]		
III. On bill drawn by said Cumming and Fairley on and accepted by Robert Balfour, draper, Falkirk, and indorsed to the said Bank by said Cumming and Fairley, dated 4th December 1899, at three months' date, ... £25 0 0		
Rebate of interest from 7th March to date of sequestration, . . . 0 2 6		
	24	17 6
IV. On bill drawn by said Cumming and Fairley on and accepted by James Smith, draper, Dalkeith, and indorsed by the drawers to said Bank, dated 11th October 1899, at 4 m/d. - . £50 0 0		
Add interest to date of sequestration, . 0 10 6		
	50	10 6
V. On bill drawn by Peter Matthew, manufacturer, Galashiels, on and accepted by the said Cumming and Fairley, and indorsed by the drawers to said Bank, dated 1st November 1899, at six months, p. £100, ... £100 0 0		
Rebate of interest from 4th May 1900 to date of sequestration, . . . 2 10 0		
	97	10 0
VI. On the following bills binding on Thomson and Wallace, drapers in Edinburgh, payment of which was guaranteed to the said Bank by the said Cum-		
Carry forward,	£939	18 0

Brought forward,		£939 18 0
ming and Fairley, conform to their Letter of guarantee to said Bank, dated 1st May 1899, viz. :—		
1. Bill drawn by said Thomson and Wallace on George Miller, clothier, Leith, dated 16th November 1899, at 3 m/d. . .	£25 0 0	
Interest thereon, ...	0 3 6	
		25 3 6
2. Bill drawn by John Thomson, manufacturer, Dundee, on and accepted by said Thomson and Wallace, indorsed by the drawer to said Bank, dated 15th October 1899, at 3 m/d.	£30 0 0	
Interest thereon, ...	0 10 6	
		30 10 6
		£995 12 0

(*Date.*) —This is the State of Debt referred to in my affidavit annexed hereto.

(*Signed*) C. D., Cashier.
A. B., Justice of Peace for the County of Edinburgh.

APPENDIX.

NOTE OF SECURITIES held by the said Bank against the said Debt.

I. Securities over the Company Estate of the said Cumming and Fairley.

1. Bill drawn by the said Cumming and Fairley on and accepted by Thomas Davidson, Leith, dated 2nd January 1900, at 3 m/d., p. £40, which is hereby valued at	£20 0 0
2. Bill drawn by said Cumming and Fairley on and accepted by William Stevenson, Dunse, dated 1st February 1900, at 2 m/d., p. £20, which is hereby valued at	15 0 0
	£35 0 0

II. Security over the Individual Estate of the said John Cumming.

Policy on the life of the said John Cumming with the Scottish Widows' Fund, dated 1st March 1870, p. £500, assigned to the said Bank by assignation in their favour by the said John Cumming, dated 11th May 1890, which is hereby valued at	£120 0 0

III. Valuation of the Obligations of parties liable in relief to the said Cumming and Fairley.

1. Robert Balfour, acceptor of bill forming item No. III. in said State, ...	£5 0 0
2. James Smith, acceptor of bill forming item No. IV. in said State, ...	10 0 0
3. Thomson and Wallace, drawers of bill No. 1, under item No. VI.	5 0 0
4. George Miller, acceptor last-mentioned bill, . .	5 0 0
5. John Thomson, drawer of bill No. 2, under item No. VI. of said State, ...	7 10 0
6. Thomson and Wallace, acceptors of last-mentioned bill, ...	10 0 0
	£42 10 0

(*Date.*) —This is the Appendix referred to in my affidavit annexed hereto.

(*Signed*) C. D., Cashier.
A. B., Justice of Peace for the County of Edinburgh.

AFFIDAVIT.

At Edinburgh, the Fourth day of March Nineteen hundred years.

In presence of A. B., one of Her Majesty's Justices of the Peace for the County of Edinburgh.

Compeared C. D., cashier, and in name and for behoof of the Bank of Scotland, who being solemnly sworn and interrogated, depones, That Cumming and Fairley, clothiers in Edinburgh, as a company,

and John Cumming and Alexander Fairley, the individual partners of that firm, were, at the date of their sequestration on 28th February last, and still are, justly indebted and resting owing to the said Bank the sum of £995 : 12s., being the amount of the prefixed State of Debt, and conform to the several grounds of debt therein specified ; which State is signed by the deponent as relative hereto, and held as engrossed herein.* Depones, That no part of said debt has been paid or compensated to the said Bank (*if payments have been got from co-obligants since the sequestration, state them here*), and that they hold no persons bound for the same other than the bankrupts and the other persons mentioned in said State. Depones, That, in security of the said debt, the said Bank hold the various securities specified in the Appendix to said State, which Appendix is here referred to and held as engrossed herein, and that they hold no other security for the said debt. Further, and with a view to voting on the company estate of the said Cumming and Fairley, the deponent hereby values the several and respective bills specified in the Note of Securities, forming the first head of said Appendix, at the respective sums there stated, amounting together to the sum of £35, and he values the obligations of the parties liable in relief to the said Cumming and Fairley, and bound on the several and respective bills specified and contained in the said Appendix under the third head thereof, at the several and respective sums there mentioned, amounting *in cumulo* to £42 : 10s., which two last-mentioned sums, amounting together to the sum of £77 : 10s., being deducted from the foresaid sum of £995 : 12s., leaves a balance of £918 : 2s., for which the deponent claims a right to vote on the company estate of the said Cumming and Fairley. And with a view to voting on the individual estate of the said John Cumming, the deponent hereby values the security held by the said Bank over his estate, as specified in the said Appendix under the second head thereof, at the sum of £120, and the deponent values the claim of the said Bank against the estate of the said company at the sum of £250 ; and the claim of the said Bank against the estate of the said Alexander Fairley, the other individual partner of said company, at the sum of £20, amounting, said three last-mentioned sums, to £390, which being deducted from the foresaid sum of £995 : 12s., leaves a balance of £605 : 12s., for which the deponent claims a right to vote in all matters relating to the individual estate of the said John Cumming; and in like manner the deponent, in claiming to vote on the individual estate of the

said Alexander Fairley, hereby values the claim of the said Bank against the said company at the sum of £250, and the claim of the said Bank against the estate of the said John Cumming at the sum of £50, which two sums, amounting together to £300, being deducted from the foresaid sum of £995 : 12s., leaves a balance of £695 : 12s., for which the deponent claims a right to vote in all matters relating to the individual estate of the said Alexander Fairley. Further, the deponent claims to be ranked on the said company estate, with a view to drawing a dividend for the foresaid sum of £995 : 12s., under deduction of the foresaid sum of £35, the value of the foresaid securities over their estate, which sum being so deducted, leaves a balance of £960 : 12s. : And he claims to be ranked on the estate of the said John Cumming with a view to drawing a dividend for the foresaid sum of £995 : 12s., under deduction of the foresaid sum of £120, the value of the foresaid security over his estates, which, being so deducted, leaves a balance of £875 : 12s. ; and he claims to be ranked on the estate of the said Alexander Fairley for the foresaid sum of £995 : 12s.—All which is truth, as the deponent shall answer to God.

(*Signed*) C. D., Cashier.
A. B., Justice of the Peace for the County of Edinburgh.

NOTE.—*It is seldom of much practical importance to vote on the estates of individual partners of a company, so that in most cases the part of the Affidavit which refers to a vote on the individual estates might be omitted.*

It will be kept in view that in a Ranking Claim *on the estate of partners, it is not necessary to value the claim against the company in the Affidavit. The trustee does this himself in adjusting the ranking.*

* *In the case where the Bank holds no security, and no other debtor bound for the debt, the Affidavit will run:*—Depones, That no part of said debt has been paid or compensated to the said Bank, and that they hold no persons bound for the same except the bankrupt, and no security for the same.—All which is truth, &c.

MANDATE TO VOTE IN A SEQUESTRATION.

(*Place and Date.*)

SIR—I hereby authorise you to attend, act, and vote at all meet-

ings in the sequestration of
with all the powers which belong to
Your obedient servant,

C. D.

To James Mitchell, Esq., Accountant, Edinburgh ;
whom failing,
Alexander Anderson, Esq., S.S.C., Edinburgh.

No stamp is required. See Bankruptcy (Scotland) Act, 1856, sec. 184.

FORM OF ACCESSION TO TRUST-DEED.

[*Place and Date.*]

SIR—I hereby accede to the trust-deed executed by A. B. for behoof of his creditors, and empower C. D. to sign the deed of accession to said trust on my behalf.

(*Signed*)

FORM OF MORTGAGE OF STOCKS.

Loan of £

Memorandum of Agreement between
(hereinafter called the borrower), on the one part, and the
(hereinafter referred to as the lenders),
on the other part.

Whereas the borrower having borrowed, or being desirous to borrow from the said BANKING COMPANY the sum of
Sterling, for the term of calendar months from the day of Nineteen hundred and , has transferred, or does hereby undertake and agree to transfer, into the name of the said BANKING COMPANY the following stocks or shares, viz. :—

which are to be held by the said BANKING COMPANY as security for the said Loan, upon the following terms, that is to say :—

1. Interest is to be charged upon the Loan and upon all further monies (if any) to be lent or paid by them to or for the borrower, at the rate of per cent. per annum.

2. The borrower shall, at the expiry of the said term of calendar months, repay the said principal sum and interest.

3. Any Dividends which may be declared upon the said stock or shares are to be received by the lenders, and placed to the borrower's credit, or to be paid by the lenders to the borrower, or his broker or agent.

4. All Calls which may be made during the continuance of the Loan upon the stock or shares thus deposited, or upon any new shares to which, if created, the holders of the existing stock or shares will be entitled, are to be paid by the borrower; but should the lenders pay them, then a commission of five shillings per cent. to be charged thereon, in addition to interest on the same, after the above rate.

5. If at any time or times during the continuance of this Agreement the market value of the said stock or shares, or any of them, shall not be per cent. above the money owing on this security—said value to be ascertained by reference to the Price Lists of the London, Liverpool, Manchester, and Glasgow Stock Exchanges, or any one of them—the borrower engages, within three days, upon being required by notice in writing to do so, by letter sent through the post-office to the borrower, addressed as above designed, to furnish such additional security, to the satisfaction of the lenders, or at the lenders' option, to repay so much of the principal money owing as shall always maintain the market value of the said securities at per cent. above the money owing.

6. At the termination of the period for which the Loan is contracted, the said Banking Company shall transfer to the borrower, or order, upon being repaid the sum that shall then be due, together with all Calls made and paid by them or remaining unpaid, including any balance of interest and commission which may remain, after deducting the dividends on the said stock or shares received in the interim, and provided the various stipulations contained in this Agreement have been fulfilled by the borrower, the whole of said stock or shares which shall then be in their hands; and failing the performance upon the borrower's part of any of the requirements contained in this Agreement, the said Banking Company are hereby authorised and empowered, without further notice or authority, to sell and dispose of, at the market price of the day, the stock or shares then in their possession, or such part of them as they may

see fit, and claim from the borrower any deficiency that may thence arise.

7. Should the said BANKING COMPANY fail to deliver the stock or shares on the borrower tending the amount due at the termination of the period for which the loan is contracted, the borrower shall have power, after giving three days' notice to the lenders, to purchase, at the market price of the day, a similar amount of stock or number of shares, and a right to claim from the said BANKING COMPANY any difference that might arise in the purchase beyond the amount due to the said BANKING COMPANY.

8. A written notice sent to or by the broker or agent of either of the parties, shall be considered equally binding as if sent to or by the principals, and all acts and things hereinbefore agreed or authorised to be done by, or to, or in favour of the borrower and lenders respectively, shall or may respectively be done by, or to, or in favour of their executors, administrators, or assignees.

9. If the broker or agent of the borrower shall require the lenders to deliver or assign all or any portion of the said securities, either before or at the termination of the period for which this loan is contracted, it shall be lawful for the lenders (if they shall think fit) to do so, and to do and execute all such acts and deeds as may be necessary for the purpose.

IN WITNESS WHEREOF, these presents, written by A. B., clerk to the said , are subscribed by the said , and by the said , at Edinburgh, the Twentieth day of February Nineteen hundred and one, before these witnesses, the said A. B. and C. D., clerk to

STAMP DUTIES.

BILL OF EXCHANGE—Payable on demand, or at sight, or on presentation, or within three days after date or sight, 1d.—See Finance Act, 1899 (62 and 63 Vict. c. 9), sec. 10.

BILL OF EXCHANGE of any other kind whatsoever (*except a Bank Note*), and PROMISSORY NOTE of any kind whatsoever (*except a Bank Note*)—drawn, or expressed to be payable, or actually paid, or endorsed, or in any manner negotiated in the United Kingdom :

Where the amount or value of the money for which the bill or note is drawn or made does not exceed £5,			£0	0	1
Exceeding £5, not exceeding £10,			0	0	2
„ 10	„	25,	0	0	3
„ 25	„	50,	0	0	6
„ 50	„	75,	0	0	9
„ 75	„	100,	0	1	0
for every £100, and also for any fractional part of £100, of such amount or value,			0	1	0

BILL OF LADING of or for any goods, merchandise, or effects to be exported or carried coastwise, 6d.

CONTRACT NOTE.—For or relating to the sale or purchase of any stock or marketable security of the value of £5 and under £100,—1d. ; £100 or upwards, 1s.

CONVEYANCE or TRANSFER, whether on sale or otherwise—

(1.) Of any stock of the Bank of England, 7s. 9d.

(2.) Of any stock of the Government of Canada, inscribed in books kept in the United Kingdom, or of any colonial stock to which the Colonial Stock Act, 1877, applies, for every £100, and also for any fractional part of £100 of the nominal amount transferred, 2s. 6d.

CONVEYANCE or TRANSFER on sale where the consideration does not exceed £5, ... £0 0 6

Exceeding	Not exceeding				Exceeding	Not exceeding			
£5	£10	£0	1	0	£175	£200	£1	0	0
10	15	0	1	6	200	225	1	2	6
15	20	0	2	0	225	250	1	5	0
20	25	0	2	6	250	275	1	7	6
25	50	0	5	0	275	300	1	10	0
50	75	0	7	6	300, for every				
75	100	0	10	0	£50, and also for				
100	125	0	12	6	any fractional part				
125	150	0	15	0	of £50, of such				
150	175	0	17	6	amount or value,		0	5	0

DELIVERY ORDER, 1d.

LETTER OF ALLOTMENT or LETTER OF RENUNCIATION, or any other document having the effect of a letter of allotment, 1d. Where nominal amount not less than £5,—6d.

LETTER OR POWER OF ATTORNEY, and COMMISSION, FACTORY, MANDATE, or other instrument in the nature thereof :

(1.) For the sole purpose of appointing or authorising a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more, 1d.

(2.) For the receipt of the dividends or interest of any stock :
Where made for the receipt of one payment only, 1s.
In any other case, 5s.

(3.) For the receipt of any sum of money, or any bill of exchange or promissory note for any sum of money, not exceeding £20, or any periodical payments not exceeding the annual sum of £10,—5s.

(4.) For the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds :
Where the value of the stocks or funds does not exceed £20, 5s.
In any other case, 10s.

(5.) Most other kinds, 10s.

MEMORANDUM OF DEPOSIT OF MARKETABLE SECURITIES.—*Under hand*, 6d. This may be denoted by an adhesive stamp.

MORTGAGE, BOND, DEBENTURE, &c. (except a marketable security otherwise specially charged with duty).

Being the principal security (other than an equitable mortgage) for—

The payment or repayment of money not exceeding £10,				£0	0 3
Exceeding £10 and not exceeding			£25,	0	0 8
„	25	„	50,	0	1 3
„	50	„	100,	0	2 6
„	100	„	150,	0	3 9
„	150	„	200,	0	5 0
„	200	„	250,	0	6 3
„	250	„	300,	0	7 6
„	300, for every £100, and also for any fractional part of £100, of such amount,			0	2 6

PROTEST of any bill of exchange or promissory note :

Where the duty on the bill or note does not exceed 1s., the same duty as the bill or note.

In any other case, 1s.

WARRANT FOR GOODS, 3d.

Exemptions.—(1.) Any document given by any inland carrier acknowledging the receipt of goods conveyed by him. (2.) A weight-note issued together with a duly stamped warrant, and relating solely to the same goods, &c.

Stamp may be adhesive—to be cancelled by the person by whom the instrument is made, executed, or issued.

The penalty for making, issuing, or receiving warrant not duly stamped is £20.

[Under the Bankruptcy Act (19 and 20 Vict. c. 79, sec. 184) all conveyances, assignations, instruments, discharges, writings, or deeds relating solely to the estate belonging to any bankrupt, against whom sequestration has been awarded, and which estate, after the execution of such conveyances, &c., shall be and remain the property of such bankrupt for the benefit of his creditors or their

trustee; and all discharges to the bankrupt, and all deeds, assignations, instruments, or writings for reinvesting the said bankrupt in the estate, and all powers of attorney, commissions, factories, oaths, affidavits, articles of roup or sale, submissions, decrees-arbitral, and all other instruments and writings whatsoever relating solely to the bankrupt estate, and all other deeds or writings forming part of the proceedings ordered under the sequestration, are exempt from all stamp duties or other Government duty.]

BANKING IN SCOTLAND.

[Abridged from the MEMORANDUM by Mr. JAMES SIMPSON FLEMING in the Appendix to the Report of the Select Committee of the House of Commons on Banks of Issue, 1875; and revised to 1901.]

The existing Scottish banks are ten in number, and are all joint stock companies. They are:—

1. The Bank of Scotland.
2. The Royal Bank of Scotland.
3. The British Linen Company.
4. The Commercial Bank of Scotland, Limited.
5. The National Bank of Scotland, Limited.
6. The Union Bank of Scotland, Limited.
7. The Town and County Bank, Limited.
8. The North of Scotland Bank, Limited.
9. The Clydesdale Bank, Limited.
10. The Caledonian Banking Company, Limited.

The six banks first mentioned have their head office or principal place of issue in Edinburgh, Nos. 7 and 8 at Aberdeen, No. 9 at Glasgow, and No. 10 at Inverness.

Banking in Scotland has no legal history prior to 1695.

The Bank of Scotland was established by the Act of the Scottish Parliament, Will. III., Parl. 1, Sess. 5 (17th July 1695), entitled "Act of Parliament for erecting a Bank in Scotland," with a capital equal to £100,000 sterling.

The capital of the bank was increased to £200,000 sterling by the Act 14 Geo. III. c. 32; to £300,000 by the Act 24 Geo. III. c. 12; to £600,000 by the Act 32 Geo. III. c. 25; to £1,000,000 by the Act 34 Geo. III. c. 19; and to £1,500,000 sterling by the Act 44 Geo. III. c. 23.

The capital authorised by the last-mentioned Act has all been subscribed, and to the extent of £1,000,000 has been paid up.

By the Act 36 and 37 Vict. c. 99, the bank was authorised to create and issue additional capital stock to any amount, not exceeding £3,000,000 sterling. This extended power has been exercised by the creation and issue of £375,000 of additional capital stock,

whereof two-thirds have been called up, making the capital created £1,875,000, with £1,250,000 paid up.

The Royal Bank of Scotland was incorporated by Royal Charter, dated the 31st May 1727. The capital was not defined.

A second Royal Charter was granted to the bank, dated 1st November 1738, which authorised a total capital of £151,000.

The capital of the bank was increased to £300,000 by a Charter, dated 10th June 1783, to £600,000 in 1788, to £1,000,000 in 1793, to £1,500,000 in 1804, and to £2,000,000 in 1829.

The British Linen Company was incorporated by a Royal Charter, dated 6th July 1746. The corporation was authorised to raise a capital joint stock not exceeding £100,000.

A second Charter was granted to the company, dated 5th June 1806, which authorised the company to enlarge the capital to any sum not exceeding £200,000.

By subsequent Charters, the last of which was dated 19th March 1849, power was given to augment the company's capital to any sum not exceeding £1,500,000 in all.

The capital of the British Linen Company already created and paid up is £1,250,000.

The Commercial Bank of Scotland, Limited, was established in 1810, and incorporated by a Royal Charter, dated 5th August 1831. The capital was declared to be £3,000,000 sterling.

The paid-up capital amounts to £1,000,000.

The National Bank of Scotland, Limited, was established on 21st March 1825 in terms of a contract of copartnership between and among the partners, by which the capital stock of the company was fixed at £5,000,000. The Bank was incorporated by a Royal Charter, dated the 5th day of August 1831.

The capital now paid up amounts to £1,000,000.

The Commercial and National banks have now been registered under the Companies Acts as limited liability companies, each with a capital of five millions, whereof one-fifth is paid up.

The remaining Scottish Banks have all been constituted since the year 1825 as joint stock companies, under contracts of copartnership, and have all been registered and incorporated under the Companies

Act, 1862, first as unlimited companies, and subsequently as limited liability companies. The Union Bank of Scotland as now constituted, although not formed under that name till a comparatively recent date, is the result of the union of several issuing banks, some of which were established in the eighteenth century. It has head offices both in Glasgow and in Edinburgh.

The paid-up capital of these banks is as follows :—

Union Bank of Scotland, Limited, . .	£1,000,000
Clydesdale Bank, Limited, . . .	1,000,000
Town and County Bank, Limited, . .	252,000
North of Scotland Bank, Limited, . .	400,000
Caledonian Banking Company, Limited, .	150,000

The limit of liability being in each case fixed at five times the amount paid up.

The right to issue bank notes or notes payable to bearer on demand has, from the infancy of Scottish banking, been regarded as a common law right, not only of the great banking corporations, but also of individuals, whose power of issue was, prior to 1844, limited only by their credit with the public, and their ability to maintain their notes in circulation. Accordingly, immediately after the institution of the Bank of Scotland in 1695, that bank began to issue such notes of the values of £100, £50, £20, £10, and £5. In 1704 the Bank of Scotland began to issue notes of the value of 20s. From its establishment in 1727 the Royal Bank issued notes of various denominations. The case of *Crawford*, 24th February 1749 (reported in Morison's Dictionary, p. 875), shows the view taken by the Court of Session of bank notes. In that case a promissory note of the Bank of Scotland had been stolen, and having subsequently come into the possession of the Royal Bank for value, a competition arose between the Royal Bank and the original owner ; and the Court held, "First, that money is not subject to any *vitium reale*, and that it cannot be vindicated from the *bona fide* possessor, however clear the proof of the theft may be ; second, that bank notes, serving the purposes of money, must be entitled to the same privileges."

In the early part of the eighteenth century the Bank of Scotland began to issue notes containing what was called an optional clause, declaring the note to be payable either on demand, or, in the option of the issuer, six months after demand, with interest at the rate of

five per cent. from the date of demand for payment. Other banking companies followed this example, and notes were issued of as low a denomination as 5s. The consequence was, that coin almost disappeared from Scotland. The optional clause was put an end to by 5 Geo. III. c. 49 (1765) ; and the issue of promissory notes for less than 20s. was thereby prohibited. Section 7, which contains this prohibition, was repealed by Statute Law Revision Act, 1867, as "virtually repealed or superseded ;" see 54 Geo. III. c. 4, and 57 Geo. III. c. 46, as to tokens ; 8 and 9 Vict., c. 38, sections 5, 16, 18, 19.

The right of the Bank of Scotland, Royal Bank of Scotland, and British Linen Company "to issue promissory notes for the sums of one pound, one guinea, two pounds, and two guineas, payable to the bearer on demand," was expressly recognised by 55 Geo. III. c. 184, as it had previously been by 39 Geo. III. c. 107, 48 Geo. III. c. 149.

By 9 Geo. IV. c. 65, the issue of promissory notes for less than £5 made or issued in Scotland or Ireland, was prohibited in any part of England under severe penalties.

With these exceptions, till the passing of the Act of 1844, there was no legislative interference with what was, till that year, the right at common law of any banking company, and of any individual or body of individuals in Scotland to make and issue promissory notes, payable to bearer on demand. During the latter half of the eighteenth and the early part of the nineteenth century, this right was exercised by numerous joint stock companies, as well as by private banking copartnerships in various parts of Scotland.

Prior to 1844 all private banks of issue had ceased to exist in Scotland, having been absorbed by one or other of the great joint stock banks.

The Act of 1844 (sec. 10) enacts, "that from and after the passing of this Act no person, other than a banker, who, on the 6th day of May 1844, was lawfully issuing his own bank notes, shall make or issue bank notes in any part of the United Kingdom."

This Act was followed by the 8 and 9 Vict. c. 38 (1845), "to regulate the issue of bank notes in Scotland," under which, since its date, the circulation of the Scottish banks has been conducted. Any Scottish bank of issue may exceed its authorised circulation by holding coin equal to the excess so issued, under conditions laid down in 8 and 9 Vict. c. 38 (21st July 1845). A return of the note circulation, &c. of the Scottish banks is published in the *Edinburgh Gazette* monthly.

The Act 7 and 8 Vict. c. 113, was passed "to regulate joint stock banks in England," and it was extended to Scotland and Ireland by 9 and 10 Vict. c. 75. These Acts were amended by 17 and 18 Vict. c. 73, and by 19 Vict. c. 3, the period was extended "for which Her Majesty may grant letters-patent of incorporation to joint stock banks in Scotland existing before the Act of 1846." None of the existing Scottish banks availed themselves of the privileges conferred by these Acts.

Legal doubts as to the right of partnerships trading under a descriptive name to sue under that name (*vide Culcreugh Cotton Company*, 27th November 1822, 2 Shaw, 47 ; *Cubbell* v. *Brock*, 13th May 1828, 3 W. & S. 75 ; and *Commercial Bank* v. *Pollock's Trustees*, 28th July 1828), led to the passing of the Act 7 Geo. IV. c. 67 (1826), "to regulate the mode in which certain societies or copartnerships for banking in Scotland may sue and be sued." The younger banks, being now incorporated by registration under the Companies Act, 1862, are entitled to sue in their corporate name.

Reference may be made to a "Return of the Names of all Banks existing in Scotland on 1st January in the years 1819, 1830, 1845, and 1864 respectively," ordered by the House of Commons to be printed 29th April 1864, as showing the gradual decrease in the number of banks in Scotland which has resulted from numerous amalgamations. Since the date of that return, the Central Bank of Scotland (No. 23) has been united with the Bank of Scotland, and the City of Glasgow Bank failed in 1878.

INDEX.

PAGE

ABSOLUTE conveyance, security by, ... 128
ACCEPTANCE of bank stock, ... 226
Of bills, ... 38-40
Forged, ... 49
ACCEPTOR for honour, ... 40
ACCESSION to trust-deed, ... 215
ACCOUNTS-current, ... 110
ACCUMULATION of interest with principal, ... 88, 113
ADHESIVE stamps, ... 30, 72
ADJUDICATION, diligence of, ... 167
ADVANCES against bills, ... 66, 117, 150
Against goods in bonded warehouse, ... 143
Against deposit-receipts, ... 86
AGENTS, bills drawn and accepted by, . . . 43, 44, 90
ALIENATIONS by insolvent persons, ... 175
ALIMENTARY funds not arrestable, ... 162
ALTERATION on bills, ... 49, 63
On cheques, fraudulent, ... 74
ARRANGEMENT, deed of, ... 209
ARRESTMENT, ... 160
Is not limited to sum in schedule, ... 161
Effect of, ... 162
Prescription of, ... 163
ASSIGNATION of Moveables, ... 132
Intimation of, ... 132
Of Life Policy, ... 134

BACK-BOND relating to advances, ... 128, 129
BANK books, entries in, ... 110
BANK holidays, ... 51
BANK notes, ... 82
BANK pass-book as evidence, ... 110
BANK stock, transfer of, ... 226
BANKER, bills in hands of, ... 65
Paying forged cheque, ... 50, 73

PAGE

BANKER'S cheque, ... 72
Draft, ... 81
Lien, ... 148
BANKER'S duty as to signatures on bills, . . . 50, 66, 67
BANKRUPT, discharge of, ... 207-209, 213, 222
Refused by court, ... 208
BANKRUPTCY, notour, ... 171, 220
Date of, as affecting concourse of debts, . . . 153
Bills within sixty days of, ... 178
Transfer of moveables within do. 179, 183
Transactions within do. 177-185
In England, ... 203
See also SEQUESTRATION.
BANKRUPTCY (Scotland) Acts, ... 187, 208, 220
BANKS, savings, ... 21
"BENEFIT of discussion," 96
BILL of lading, ... 68, 138
BILL transactions within sixty days of bankruptcy, . . 178
BILLS and promissory notes, ... 26-67
Privileges of, ... 26, 29
Essentials of, ... 27
Parole evidence admissible on bills, . . . 29, 32, 151
Stamp duty on, ... 29
Consideration for, ... 31
Date of bill, ... 32
Sum in bill, ... 32
Payable by instalments, ... 33
Interest, legal rate, ... 33
Term of payment in bill, ... 33
Payee's name in bill, ... 34
Promissory note to more than one payee, . . 35
Place of payment in bill, ... 35
See "PRESENTMENT FOR PAYMENT."
Contract and liability of drawer, ... 35
Drawer or others may insert "referee in case of need," . 36
Presentment for acceptance, ... 36
Presentment (in Scotland) attaches funds, . . 38, 76
Acceptance of bill, ... 38
Blank bill form, effect on party signing and delivering, . 40
Accepted "payable at" bank, ... 40, 66
Acceptance for honour, ... 40
Rules of presentment, ... 41
Payment for honour, ... 41
Payer entitled to bill and protest, . . . 42

PAGE

BILLS and promissory notes—*continued.*
Subscription of parties to bill, ... 42
Signature in trade name, ... 42
P. pro., &c. 42-44
Indorsation of bill, ... 44
Liability of indorser, ... 45
Kinds of, ... 45-47
Order of indorsations, ... 47
Transmission of bill, ... 47
"Negotiation" defined, ... 48
Forgery of bill, ... 49
Banker paying under, ... 50
Time for payment and days of grace, ... 51
"Legal" and "local" holidays, ... 51
Term "month," and "days" in bill, . . . 51, 52
Right of action on bill accrues, when? . . . 52
Presentment for payment, ... 52
Parties discharged by non-presentment, . . . 52
Unnecessary, when? 53
Dishonour by non-payment, ... 54
Notice of dishonour of bill, ... 54
Rules for, ... 55-57
Protest of bills, ... 57
Place of, ... 58
Contents of, ... 59
Diligence, how transmitted, ... 59
Parties who may attest dishonour, ... 60
Summary diligence, ... 57, 60
Warrant for, ... 61
Incompetent, when? 61
Discharge of bill, ... 61
Payments to account, ... 62
"Material" alterations, ... 49, 62, 63
Bill in a set, ... 30, 63
Prescription of bill, ... 63
Sexennium, effect of, on, ... 63, 64
How interrupted, ... 64, 65
Bills in hands of banker, ... 65
BILLS, by companies, ... 42
Lodged for collection, ... 67, 149
Document, ... 68
As security for cash-account, &c. . . . 66, 117, 150
In hands of a banker, ... 65
BILLS of sale (of ships), ... 127
BOND and disposition in security, ... 122

PAGE

BOND, personal, for cash-credit, ... 108
Heritable, do. 121
Of bottomry, ... 127
Of *respondentia*, ... 127
Diligence on cash-credit, ... 116
BORROWING powers of public bodies, . . . 118-120
County Councils, ... 119
Parish Councils, ... 119
School boards, ... 119, 120
BOTTOMRY, bond of, ... 127
BURGAGE subjects, ... 17

CALLS by companies may be mortgaged, ... 146
CANCELLING adhesive stamps, ... 30, 73
CAPACITY to execute deeds, ... 6
CASH-CREDIT, ... 108-120
Form of, ... 108
Rights of sureties, ... 109
Bank's duty towards sureties, ... 110
Operations on account, ... 110
Voucher necessary for operations on, ... 110
Debiting bills to account, ... 111, 112
Overdrafts, ... 111
Evidence of bank books, ... 110
Accumulation of interest with principal, . . . 113
To a company, ... 114
Change in copartnership, ... 115
Termination of bond, ... 115
Diligence on bond of, ... 116
Bills as foundation of, ... 117
On minutes by public bodies, ... 118
CASH payments by insolvent person, ... 177
CAUTIONARY obligations, ... 94
Construction of, ... 95
Prescription of, ... 100
To or for a firm, ... 102
By a firm, ... 104
Where septennial limitation does not apply, . . . 101
CAUTIONER, ... 96-100
"Benefit of discussion," 96
Relief of, ... 96, 98
Retention by, ... 97
Discharge of, ... 98-100
CERTIFICATE of amount due on cash-account, . . 108, 116
Cessio bonorum, ... 220
CHEQUE, banker's, ... 72-80

PAGE
CHEQUE, definition of, ... 72
Post-dated, &c. 72
Stamp Act, 1891, ... 72
Negotiation of, ... 73
Kinds of indorsements on, ... 73
Forged, banker's position regarding, ... 50, 73
Fraudulent alterations on, ... 74
Presentment of, ... 74
"Out of date" defined, ... 75
"Insufficient funds," 76
Presentment operates intimated assignation, . . . 76
Dishonour of, ... 76
Revocation of authority to pay, ... 77
Crossed, ... 77-80
CHILDREN, rights of, ... 17-19
CIRCULAR notes, ... 81
CLAIM on a company estate and partners, ... 194
CLAIMS for voting under sequestration, ... 188
COLLUSION with view to discharge of bankrupt, . . . 211
COMPANIES Act, 1900, ... 135, 146
Joint stock, bills by, ... 42
Loans to, ... 135
COMPANY, effect of changes in partnership, . . 102, 115
Obligations out of line of business of, ... 104
Cash account in name of a, ... 114
Obligations by a, ... 103
COMPANY estates, ranking on, under sequestration, . . 201
COMPENSATION, ... 151
COMPOSITION, settlement by, ... 196, 205
Discharge without, ... 207
Recovery of, ... 207
Contract, ... 217
CONFIRMATION, estates not over £500, ... 21
Of executors, ... 16, 19, 21
CONFUSION, discharge by, ... 154
CONJUNCT and several obligations on bills, . . . 44, 45
And confident persons, who are? 176
CONSIDERATION for bill, ... 31
CONSIGNATION receipt, ... 87, 236
CONSTITUTION of guarantees, ... 105
CONSTRUCTIVE delivery, ... 132
Fixtures, ... 131
CONTRACT of drawer of bill, ... 35
Of pledge, ... 144
CONVEYANCE, absolute. *See also* HERITAGES, . . . 128
CONVEYANCING (Scotland) Act, 1874, ... 4

PAGE
COPARTNERY, dissolution of, ... 103
CORPOREAL moveables, transfer of, ... 136
COUNTY COUNCILS, borrowing powers of, ... 119
COURTESY, ... 18
COVERT sales, ... 180
CREDIT, CASH, ... 108
Letter of, ... 80
CREDITORS, meetings of, ... 196
CREDITS, Foreign, ... 70
Marginal, ... 71
CROSS bills, ... 200
CROSSED cheques, ... 77-80
CURATORS, powers of, ... 7
CURRENT accounts, ... 110

DATE in bill, ... 32
DATIVE, executor, ... 16
DAYS of grace, ... 51
DEBT, imprisonment for, abolished, . . . 173, 220
DEBTS, prescription of, ... 156
DECENNIAL prescription, ... 158
DEED of arrangement, ... 209
DEEDS, execution of, ... 2-6
Witnesses to, ... 3-5
Notarial subscription of, ... 3-5
Signing by stamp, ... 5
Parties who may grant, ... 6
DEFINITION of cheque, ... 72
DEL CREDERE guarantees, ... 107
DELEGATION, ... 154
DELIVERY, constructive, ... 132
DELIVERY order, ... 140
DEPOSIT of titles, &c. 146
DEPOSIT-RECEIPT, ... 84-87
Stamp duty on, ... 84
Negotiability of, ... 84
Legal decisions regarding donation of, *mortis causa*, . . 85
Payable to more than one, ... 85
Advances against, by bank, ... 86
Lost deposit-receipts, ... 86
Receipts to a married woman, ... 87
Indorsed by mark, ... 87
Bank in doubt as to owner of, ... 87
DILIGENCE of arrestment, ... 160
Of poinding, ... 163, 168

PAGE

DILIGENCE of inhibition, ... 166
Of adjudication, ... 167
On a bill, ... 57, 60
On a bond, ... 116
DIRECTORS, bills and notes by, ... 44
DISCHARGE and receipt, ... 155
Implied, ... 156
DISCHARGE of bankrupt, ... 207-209, 213, 222
Of cautioner, ... 98
Under guarantee, ... 107
Of bill of exchange, ... 61
Of drawers and indorsers of bills, ... 52
DISCUSSION, ... 96
DISHONOUR of bill, ... 54
Parties who may attest, ... 60
Of cheque, ... 76
DISPOSITION in security—*See* BOND.
DISSOLUTION of marriage, ... 17
Copartnery, ... 103
DIVIDENDS from bankrupt estate, ... 203
Mandate to uplift, ... 226
DIVISION of estate under sequestration, ... 203
DOCQUET by notary or Justice of Peace, ... 5, 42
DOCUMENT bills, ... 68
DOCUMENTS payable abroad, banker's course with, . . 70
DRAFT, banker's, on demand, form of, ... 81
DRAWER of bill, ... 35

ENDORSEMENTS on bills, ... 44-47
On cheques, ... 73
ENTRIES in bank books as evidence, ... 110
ESSENTIALS of bill, ... 27
ESTATE of bankrupt, division of, ... 203
EXECUTION of deeds, ... 2, 6
English form, ... 4
EXECUTOR, ... 16-21
Office of, ... 19
Confirmation of, ... 16, 19, 21
Nominate, ... 16, 19, 20
Dative, ... 16
EXECUTORS (Scotland) Act, 1900, ... 20
EXPENSES in sequestration, creditors not liable for, . . 191

FACTOR, powers of, ... 89
Cannot delegate his powers, ... 90

PAGE

FACTORY and commission, ... 88-90
General and special, ... 89
Powers under, ... 89, 90
Recall of, ... 90
FEU and burgage subjects, ... 17
FIRM obligations, ... 102-104
FIXTURES, heritable, ... 131
FLEMING'S, JAS. S., Memorandum on Scotch banks, . (Appendix)
FOREIGN BILLS, ... 27, 30, 45, 57, 63
FOREIGN credits, ... 70
FORGERY of bills, ... 49
Of cheques, ... 50, 73
FRAUDULENT alteration of bill, ... 49, 62
Of cheque, ... 74
FUNDS, public, ... 224
FURTHCOMING, action of, ... 161

GENERAL security over heritages, ... 128
Over moveables, ... 132
GOODS in communion, ... 18
In bonded warehouse, advances against, . . . 143
GOVERNMENT stocks, transfer of, ... 224
GRACE, days of, ... 51
GROUND, poinding of, ... 168
GUARANTEES, ... 105-107
Constitution of, ... 105
Informal, perfected *rei interventu*, ... 105
Terms of, important, ... 106
Relief under, and discharge of, ... 107
Del credere, ... 107
Not illegal though within sixty days of bankruptcy, . . 185
GUARANTOR of bill, ... 107

HERITABLE securities, ... 121
Now moveable as to creditor's succession, . . . 17
HERITABLE Securities Act, 1894, ... 124
HERITAGES, securities over, ... 128
Diligence affecting, ... 166
HOLIDAYS, bank, ... 51
HOLOGRAPH writs, prescription of, ... 158
HONOUR, acceptor for, ... 40
Payment for, ... 41
HUSBAND and wife, property of, ... 8-15

IMPLIED discharge, ... 156

PAGE
IMPLIED mandate, ... 92
IMPRISONMENT for debt abolished, . . . 173, 220
INCORPOREAL rights, assignation of, ... 132
INDEMNITY, letter of, to banker, ... 70, 235
INDORSATION of bill, ... 44
Of cheque, ... 73
Of deposit-receipt, ... 84-87
INHIBITION, diligence of, ... 166
Prescription of, and renewal of, ... 167
INLAND bills, ... 27
I.O.U. (see Appendix for form of), ... 83
INSOLVENCY, ... 171
INSOLVENT persons, alienations by, ... 175
"INSUFFICIENT funds," 76
INSURANCE—sea policy—stamping of, ... 69
INTEREST, rate of, on bills, ... 33
Accumulation of, ... 88, 113
INTESTATE succession, ... 16
Rules of, ... 18
Estates not exceeding £500, ... 21
INTIMATION of assignation, ... 132
INVESTMENT powers of trustees, ... 24

JOINT stock companies, bills by, ... 42
JUDICIAL consignments, ... 87
Form of receipt for, ... 236
Proceedings—*See* DILIGENCE.
Jus mariti, ... 8, 12
relictæ, ... 17
JUSTICE of Peace, subscription by, ... 5, 42

LADING, bill of, ... 68, 138
LAW of succession, ... 18
LEASEHOLD subjects, security over, ... 124
LEEMAN'S Act, ... 226
LEGAL holidays, ... 51
Tender, ... 82
Expiry of, ... 167
LEGITIM, ... 17, 19
LETTER of credit, ... 80
When, does not require stamp, ... 80
LIABILITY of drawer of bill, ... 35
LIEN by unpaid seller of goods, ... 138
LIEN, banker's, ... 148
Distinctions between discounted and security bills under, . 151

PAGE

LIFE assurance policies, assignation of, ... 134
LINES of succession, ... 19
LOANS on stocks, ... 135
Form of agreement regarding, ... 246
LOANS to companies, ... 135
LOST deposit-receipt, ... 86

MACHINERY, what is heritable and what is moveable, . . 131
Security over, ... 131, 132
MAJORITY at meeting of creditors, ... 196
MANDATE, ... 88
Recall of, ... 90
Implied, ... 92
To uplift dividends, ... 226
MARGINAL credits, ... 71
MARK, deposit-receipt indorsed by, ... 87
MARRIAGE, dissolution of, ... 17
By death of husband, how property divided, . . . 17
By death of wife, how property divided, . . . 18
MARRIED women, obligations by, ... 8-15
Common law, ... 8
What debts husband liable for, ... 8
Personal obligations by, ... 9
Earlier Acts relating to, ... 10-12
Policies of Assurance Act, 1880, ... 13, 176
Married Women's Property Act, 1881, . . . 13
Cannot become liable on bill, ... 29
Deposit-receipt to, ... 87
MEETINGS of creditors, ... 196
MERCANTILE agent, sale or pledge by, ... 137
Writs, ... 1
MINISTER, parish, may act as notary, ... 5
MINORS, obligations by, ... 7
Authority of curator for, ... 7
Legal administrator of, ... 7
Deeds by, reducible, ... 7
Holding out as major, ... 7
MINUTES by public bodies for overdrafts, ... 118
MONEY, ... 82
Payment of, how proved, ... 155
MORTGAGES on ships, ... 125
When reducible, ... 127
Of calls by companies, ... 146
MOVEABLE property, transfer of, ... 136
Security over, ... 132

PAGE
MOVEABLES, as security within sixty days of bankruptcy, 180, 183
MOVEABLES, intestate succession to, ... 16

NEGATIVE or long prescription, ... 158
NEGOTIATION of bills, ... 47, 48
Of cheques, ... 73
NEXT of kin, ... 16, 17, 19
NOMINATE, executor-, ... 16, 19, 20
NOTARIAL docquet, form of, ... 6
NOTARY and witnesses—subscription by, for party, . 3, 5, 6, 42
Parties who may act as, in certain cases, . . . 5
NOTE, promissory—*See* BILLS.
NOTES, bank, ... 82
Circular, ... 81
NOTICE of dishonour of bill, ... 54
NOTOUR bankruptcy, ... 171, 220
effect of, ... 174
NOVATION, ... 153

OATH in sequestration, ... 189, 243-245
OBLIGATIONS, cautionary, ... 94
Prescription of, ... 100
To, or for, or by a firm, ... 102-104
"Conjunct and several," on bills, . . . 44, 45
OBLIGATIONS of married women, ... 8
OFFICE of executor, ... 19
Trustee, ... 22
ONEROSITY of bills, ... 31
OPERATIONS on cash-account, ... 110
OVERDRAFTS do. 111
To school boards, ... 120

PARISH councils, borrowing powers of, ... 119
Minister may act as notary, ... 5
PAROLE evidence on bill, &c. 29, 32, 151
On money payments, ... 155
PARTIES to bill, subscription of, ... 42
PARTIES who may grant deeds, ... 6
PARTNERSHIP, changes in, ... 102, 103
PASS-BOOK, entries in, as evidence, ... 110
PAYEE's name in a bill, ... 34
PAYMENT of bills, ... 61, 155
To account of, ... 62
Place of, ... 35, 52
Time for, ... 51

PAGE
PAYMENT of cheque, ... 75
Of money, ... 155
Creditor's right to apply, indefinite, . . . 156
PAYMENT for honour of bill, ... 41
PAYMENTS in cash by insolvent person, ... 177
PERSONAL bond for cash-credit, ... 108
PLACE of issue in bill, ... 32
Of payment, ... 32, 35, 52
Of protest, ... 58
PLEDGE, contract of, ... 144
By mercantile agent, ... 137
POINDING, diligence of, ... 163
Of the ground, ... 168
POLICY—sea insurance—must be stamped, . . . 69
Assignation of life, ... 134
POSITIVE prescription, ... 159
POST-DATING of cheques, ... 72
POWER of attorney for sale of public funds, &c. . . . 225
POWERS of mandatory and factor, ... 89
Of tutors and curators, ... 6, 7
PREFERENCES in bankruptcy, ... 177-181, 211
PRESCRIPTION, law of, ... 157
Of bills, ... 63
Of cautionary obligations, ... 100
Of debts and obligations, ... 156
Triennial, ... 157
Quinquennial, ... 157
Sexennial (bills), ... 63, 158
Septennial, ... 101, 158
Decennial, ... 158
Vicennial, ... 158
Negative, ... 158
Positive, ... 159
Of arrestments, ... 163
Of inhibition, ... 167
PRESENTMENT of bills for acceptance, ... 36, 40
For payment, ... 52
Of cheque, ... 74, 76
PRIVILEGES of bills, ... 26, 29
PROBATE of a will, ... 16, 17
PROCURATION to sign bills, &c. 90-92
How constituted, ... 90
Powers of parties under, ... 91
Must be stamped, ... 91
PROMISSORY note—*See* BILLS.

PAGE

PROTECTION to banker paying forged cheque, &c. . . . 50, 73
PROTEST of bill, ... 57
PUBLIC bodies, cash-accounts on minutes of, . . . 118
Works, security over, ... 131
Stocks, transfer of, ... 135, 224
PUPILS, obligations by, ... 6
Parties who may grant deeds for, ... 7
Who may be guardians of, ... 7
Tutors for, powers of, ... 7
Discharge by father of, ... 156

QUINQUENNIAL prescription, ... 157

RANKING of claims, ... 197-203
RECEIPT, deposit, ... 84-87
For judicial consignments, ... 87, 236
RECEIPT and discharge, ... 155
REDUCTION of preferences, ... 175, 177
REFEREE in case of need, ... 36
Rei interventus, ... 105
RELIEF under cautionry, ... 96-98
Under guarantees, ... 107
Respondentia, bond of, ... 127
RETENTION, right of, by seller of goods, ... 138
Or lien, duration of, ... 149
REVOCATION of banker's authority to pay cheque, . . . 77
RIGHT of administration, ... 8
Of action on bill accrues, when ? 52
RIGHTS of children, ... 17-19
RULES for voting in sequestration, ... 191
For ranking do. 197
RULES of moveable succession, ... 18

SALE, bill of (on ships), ... 127
SALE of Goods Act, 1893, ... 136
When property passes under, ... 136
Sale by mercantile agent, ... 137
Rights of unpaid seller of goods, . . . 137, 139
When right of retention and stoppage *in transitu* defeated, . 138
When seller may arrest or poind, ... 163
SAVINGS banks may pay without confirmation, when ? . . 21
SCHOOL Boards, borrowing powers of, ... 119
SECURITIES, heritable, ... 121
Now moveable as to creditor's succession, . . . 17
General, over heritages, ... 128
SECURITIES over leasehold subjects, ... 124

PAGE

SECURITIES, valuing of, under Bankruptcy Act, . . . 191
SECURITY bills, ... 117, 150
SECURITY over moveables, ... 132, 138-144
SEPTENNIAL limitation, ... 101, 158
SEQUESTRATION, ... 186-213
Persons who may be sequestrated, . . . 186, 187
Trustee under, ... 186, 188
Claims for voting, ... 188
Rules for voting, ... 191
Creditors not liable for expenses of, ... 191
Claim on company estate, ... 194
Rules for ranking, ... 197
Double ranking excluded, ... 200
Of company estates, ... 201
Division of estate under, ... 203
Settlement by composition, ... 205
Recovery of do. 207
Winding-up under deed of arrangement, . . . 209
Discharge—*See* BANKRUPT.
SET, bill of exchange in a, ... 30, 63
SETTLEMENT by composition, ... 205
SEXENNIAL prescription, ... 63, 158
SHARES, &c., loans against, ... 135
SHIPPING documents, ... 68
SHIPS, mortgages on, ... 125
"SHORT loans," against shares, &c. 135
SIGNATURES under cash-credit bond, ... 109
SMALL Estates Acts, confirmation under, ... 21
STAMP on bill, ... 29
Duty on cheque, ... 72
Adhesive, ... 30, 72
On policy of marine insurance, ... 69
On back-letter or on disposition, ... 129
Duty on deposit-receipt, ... 84
STAMP, party using for signature insufficient, . . . 5
STAMP duties, table of, ... (Appendix)
STOCKS, transfer of Government, ... 224
Of bank, ... 226
STOCKS, loans on, ... 135
STOPPAGE *in transitu* of goods, ... 138, 143
SUBSCRIPTION by parties to bills, ... 42
Of deeds, ... 2-6
SUCCESSION, law of, ... 18
Rules of, ... 18, 19
Lines of, ... 19

PAGE
SUM in bill, ... 32
SUMMARY diligence, ... 57, 60
SUNDAY, bill dated on, ... 32
SURETIES on cash-accounts, rights of, ... 109
On cautionary obligations, ... 95, 96

TERM of payment in bill, ... 33
TERMINATION of cash-credit bond, ... 115
TERCE, ... 17
TESTAMENTARY trustees, ... 22
TESTING clause in a deed, ... 2-6
TIME for payment of bill, ... 51
TITLES, deposit of, ... 146
TRANSACTIONS within sixty days of bankruptcy, . . 177-185
TRANSFER of bill, ... 47
Of cheque, ... 73
Of letter of credit, ... 80
Of corporeal moveables, ... 136
Of Government stock, ... 224
Of bank stock, ... 226
Of moveables within sixty days of bankruptcy, . 179-183
TRANSMISSION of bill, ... 47
TRIENNIAL prescription, ... 157
TRUST-DEED for creditors, ... 214
TRUSTEE in sequestration, ... 186
What property vests in, ... 186
Election of, ... 188
In cessio, ... 222
TRUSTEES under Trusts Acts, 1861 to 1900, . . . 22-25
Testamentary, ... 22
Gratuitous, meaning of, ... 22
Investments by, ... 23-25
May be personally liable for investments, . . 25
May indorse bills, ... 46
TUTORS, powers of, ... 7

VALUATION of securities in a voting claim, . . . 191
In a ranking claim, ... 197
VALUE in bills, ... 31
VICENNIAL prescription, ... 158
VOTING, claims for, under sequestration, . . . 188
Rules for, under sequestration, ... 191
VOUCHERS for cash-account, ... 110
Production of, in sequestration, . . . 190

PAGE

WAGES not exceeding 20s. not arrestable, ... 162
WARRANTS for goods, ... 144
WIFE, powers of (and see MARRIED WOMEN), . . . 8-15
Right to her own earnings, ... 13, 14
Debts of, prior to marriage, ... 8, 15
Deserted by husband may have her earnings protected, . 10-12
When, may contract debts and sue and be sued, . . 8, 9
Living with husband, effect of antenuptial contract, . . 8
WILL, probate of, ... 16
WINDING-UP under deed of arrangement, ... 209
WITNESSES to a deed, ... 3-5
WRITER of a deed, ... 2
WRITINGS *in re mercatoria*, ... 1

Edinburgh: Printed by James Skinner & Company.